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Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

EDWARD and PAMELA REISER,
and JANET GREENLEE,

Petitioners,

v.

RESIDENTIAL FUNDING CORPORATION,
a/k/a GMAC-RFC,

Respondent.

**On Petition for a Writ of Certiorari**
**To the United States Court of Appeals**
**for the Seventh Circuit**

# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

Sixteen years ago, the Seventh Circuit wrote an Illinois statute off the books by holding it was "implicitly repealed." Since then, an Illinois intermediate appellate opinion considered and expressly rejected the Seventh Circuit's *Erie* prediction concerning "implicit repeal." The state opinion rejecting the *Erie* prediction of "implicit repeal" recently was confirmed as authoritative by another Illinois intermediate appellate opinion. This appeal concerns the Seventh Circuit's recent insistence that the state statute was "implicitly repealed" despite continued viability of the state statute in state courts and the Illinois legislature. The petition presents at least two recurring issues of national importance.

1. Whether a federal court of appeals violates fundamental principles of federalism by applying new standards and adhering to its own 16-year-old *Erie* prediction – refusing to recognize a state statute -- despite all subsequent state intermediate appellate opinions on point that expressly reject that *Erie* prediction.

2. Does a 16-year-old *Erie* decision by a federal court of appeals relieve federal district courts of their duty under *Erie* to

consider state intermediate appellate decisions issued subsequent to the 16-year-old *Erie* prediction.

## RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioners state that they have no parent companies or nonwholly owned subsidiaries.

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## PETITION FOR A WRIT OF CERTIORARI

### OPINIONS BELOW

The opinion of the court of appeals (App., Ex. A) is reported at 380 F.2d 1027. The district court's opinions on the underlying issue are attached. (App., Ex. C and E).

### JURISDICTION

The jurisdiction of the district court was invoked pursuant to 28 U.S.C. § 1332 (diversity jurisdiction), 28 U.S.C. § 1331 (federal question jurisdiction), 28 U.S.C. 1367 (supplemental jurisdiction), 12 U.S.C. § 2601, *et seq.* (Real Estate Settlement Practices Act), 15 U.S.C. § 1601, *et seq.* (Truth in Lending Act). The court of appeals invoked discretionary jurisdiction pursuant to 28 U.S.C. § 1292(b) (interlocutory decisions). The court of appeals' judgment was entered on August 19, 2004. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1) (certiorari).

### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. 28 U.S.C. 1652. (Rules of Decision Act)

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be

regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

2. Illinois Compiled Statutes, Chapter 815, section 205/4.1a. (App. Ex. F):

3. Illinois Compiled Statutes, Chapter 815, section 205/4 (App. Ex. G):

## STATEMENT

### A. The Significance Of This Case.

#### 1. This Case Presents Important Questions Of Federalism.

This case raises important recurring questions of federalism applicable to all federal courts and to other present and future litigants in other cases. This case provides the Court with the opportunity to (i) pronounce the correct *Erie* standard for the evaluation and determination of state law when subsequent state intermediate appellate opinions consider and expressly reject an *Erie* prediction made by a federal court of appeals;[1] (ii) provide guidance to district courts by deciding whether they are absolved of their *Erie* duty to consider recent state intermediate appellate opinions simply because their court of appeals has made a previous *Erie* prediction;

1 *See Erie v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817 (1938).

(iii) end the federal courts' recurring refusal to recognize a state statute that state courts continue to enforce in Illinois; (iv) foreclose the forum shopping that necessarily results from inconsistent federal and state court holdings on the viability of a state statute that the state legislature has not repealed.

### 2. This Case Is Important To Other Persons In Other Litigation.

The importance of this case to persons other than petitioners was recognized by the Seventh Circuit, which agreed with the district judge's recognition that "many suits similar to this one are pending elsewhere . . . ."[2] The Court below also noted that disposition of the "implicit repeal" issue "could accelerate the disposition of many pieces of litigation."[3]

### 3. This Case Involves A Recurring Issue.

The recurring nature of this case is evidenced by the appellate court's and the district courts' repeated dismissals of claims through the years based on the Seventh Circuit's 16-year-old *Erie* prediction.[4]

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2 *Reiser v. Residential Funding Corp.*, 380 F.3d 1027, 1029 (7th Cir. 2004).

3 *Reiser*, 380 F.3d at 1029.

4 *See Reiser*, 380 F.3d at 1029-30 (holding section 4.1a implicitly

### 4. This Case Demonstrates A Split In The Court Of Appeals' *Erie* Jurisprudence.

*Reiser* stated a standard contrary to this Court's precedent and that of other courts of appeals concerning the weight to be given state intermediate court decisions in making an *Erie* decision.

## B. The Facts Leading To This Petition.

The court of appeals below continues to write a state statute off the books by finding the statute had been "implicitly repealed."[5] The court below failed to follow two state appellate court opinions that expressly rejected the court of appeals' 16-year-old prediction that the state statute was "implicitly repealed."[6] As a result of the court of appeals' outcome-determinative decisions, federal courts continue to dismiss claims under the state statute, and state courts continue to recognize claims under the statute.[7]

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repealed); *Currie v. Diamond Mortgage Corp.*, 859 F.2d 1538, 1543 (7th Cir. 1988) (holding section 4.1a implicitly repealed); *Spann v. Community Bank*, No. 03 C 7022, 2004 Westlaw 691785, at *10 (N.D. Ill. 2004) (not designated for publication) (following *Currie* and holding section 4.1a implicitly repealed); *Krone v. 125 Home Loan Owner Trust*, No. 01-cv-0691-MJR, at 10 (S.D. Ill. filed Aug. 27, 2003) (citing *Currie* and holding section 4.1a implicitly repealed).

5 *See Reiser*, 380 F.3d at 1029-30; *see also Clark*, 807 N.E.2d at 118.

6 *See Fidelity Fin. Serv., Inc. v. Hicks*, 574 N.E. 2.d 15, 18-20 (Ill. App. Ct. 1991); *see also U.S. Bank Nat'l Assoc. v. Clark*, 807 N.E.2d 1109, 1118 (Ill. App. Ct. 2004), pet. *for rev.* filed May 5, 2004 (Ill.).

7 *See Reiser*, 380 F.3d at 1029-30; *see also Clark*, 807 N.E. 2d at 118.

## 1. *Currie*, The 16-Year-Old *Erie* Prediction.

In *Currie v. Diamond Mortgage Corp. of Illinois*, the court of appeals affirmed that section 4.1a of the Illinois Interest Act was implicitly repealed.[8] *Currie* concerned the effect of the 1981 amendment of chapter 17, section 6404(1)(*l*) of the Illinois Revised Statutes:

> (1) . . . It is lawful to charge, contract for, and receive any rate or amount of interest or compensation with respect to the following transactions:
>
> . . .
>
> (*l*) Loans secured by a mortgage on real estate.[9]

The amendment also prohibited prepayment penalties on loans with an interest rate exceeding eight percent per annum.[10]

The Court concluded that the purpose and plain language of amended section 6404(1)*(l)* was inconsistent with section 4.1a.[11] Section 4.1a limits fees on loans exceeding eight percent per annum to three percent of the loan principal and provides that effective interest rates be calculated by including the amount of points

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8 *See Currie v. Diamond Mortgage Corp.*, 859 F.2d 1538, 1543 (7th Cir. 1988).

9 *See Currie*, 859 F.2d at 1542.

10 *See Currie*, 859 F.2d at 1542.

11 *See Currie*, 859 F.2d at 1542-43.

charged.[12] The court affirmed the bankruptcy court's holding that section 4.1a was implicitly repealed.[13] Notably, the *Currie* court wrote without benefit of any state intermediate appellate opinion addressing "implicit repeal" of section 4.1a.

**2. Contrary State Opinions After *Currie*.**

*Currie* -- decided 16 years ago – was decided before two subsequent intermediate state appellate opinions addressed section 4.1a. The first subsequent state opinion, *Fidelity Financial Services, Inc. v. Hicks*,[14] expressly rejected *Currie* and held that section 4.1a was not implicitly repealed. The second subsequent state opinion, *U.S. Bank National Association v. Clark*,[15] recently confirmed the continued precedential force of the first subsequent state opinion, *Hicks*. These Opinions were written by the First District Appellate Court in Chicago, which decides almost one-half of the appeals filed in Illinois appellate courts.

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12 *See Currie*, 859 F.2d at 1543.
13 *See Currie*, 859 F.2d at 1543.
14 574 N.E.2d 15, 19 (Ill. App. Ct. 1991).
15 807 N.E.2d 1109, 1118 (Ill. App. Ct. 2004), *pet. for rev. filed* May 5, 2004 (Ill.).

### a. ***Hicks.***

*Hicks*, a state intermediate appellate opinion, held section 4.1a is not implicitly repealed. *Hicks* noted that section 4.1a remained part of the Interest Act twelve years after its ostensible "repeal," indicating legislative intent that 4.1a remain in effect.[16] The *Hicks* court found section 4 and section 4.1a address charges of a different nature and are not incompatible, stating:

> More importantly, Section 4 and Section 4.1a address charges of different nature and are not incompatible. Section 4.1a, rather than being inimical to the intent of Section 4, facilitates Section 4. By permitting any amount or rate of interest [in Section 4], the legislature provided that the cost of money could be passed to the borrower, assuring more money for the lending. By limiting ancillary charges in connection with loans [in Section 4.1a], the legislature assured that costs passed to borrowers accurately reflected the cost of money, assuring a more competitive market while limiting the possibilities for abuse. Because reasonable interpretations reconcile the statutes, we decline to repeal section 4.1a by implication.[17]

### b. ***Clark.***

*Clark*, the second state intermediate appellate opinion subsequent to *Currie*, stated, "In this case, *Currie* and *Hicks* raised questions as to whether the three-point limit in section 4.1a of the

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16 *See Fidelity Fin. Serv., Inc. v. Hicks*, 574 N.E. 2.d 15, 19 (Ill. App. Ct. 1991).

17 *See Fidelity Fin. Serv., Inc. v. Hicks*, 574 N.E. 2.d, 15, 19 (Ill. App. Ct. 1991).

Interest act had been implicitly repealed by the adoption of section 4 of the Interest Act . . . ."[18] The court of appeals concluded that the 1992 reenactment of section 4.1a, subsequent to the *Hicks* decision, "may be fairly be [sic] said to show a legislative intent to dispel the questions raised by the tensions between *Currie* and *Hicks.*"[19] The *Clark* opinion stated that *Currie*'s holding of implicit repeal was dicta, unpublished cases of federal courts were not precedential, private letter rulings issued by an administrative agency generally have no precedential effect and an opinion of the attorney general was not binding.[20] Notably, the Illinois Attorney General intervened in *Clark*, and asserted section 4.1a remains the law of Illinois.[21]

### 3. ***Reiser*, The Case Below.**

In *Reiser v. Residential Funding Corp.*, the court below was squarely confronted with whether section 4.1a is implicitly repealed.[22] The district court below conducted a proper Erie inquiry,

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18 *See U.S. Bank Nat'l Assoc. v. Clark*, 807 N.E.2d 1109, 1118 (Ill. App. Ct. 2004 ), *pet. for rev. filed* May 5, 2004 (Ill.).
19 *See U.S. Bank Nat'l Assoc. v. Clark*, 807 N.E.2d 1109, 1118 (Ill. App. Ct. 2004), *pet. for rev. filed* May 5, 2004 (Ill.).
20 *See U.S. Bank Nat'l Assoc. v. Clark*, 807 N.E.2d 1109, 1114-15 (Ill. App. Ct. 2004), *pet. for rev. filed* May 5, 2004 (Ill.).
21 *See U.S. Bank Nat'l Assoc. v. Clark*, 807 N.E.2d 1109, 1121 n.6 (Ill. App. Ct. 2004), *pet. for rev. filed* May 5, 2004 (Ill.).
22 *See Reiser v. Residential Funding Corp.*, 380 F.3d 1027, 1029 (7th Cir. 2004).

giving weight to the intermediate state courts' analysis of state law (App. Ex. E, pp 43a-48a; App. Ex. B, pp. 14a-16a). Despite the two intervening state appellate opinions, the court of appeals saw little point in reexamining the issue of "implicit repeal" of the state statute.[23] Despite the district court's reasoned application of *Erie* precedent giving weight to state court opinions and other factors, the Court of Appeals chastised the district court for not blindly following its sixteen-year old decision in *Currie*.[24] *Reiser* proclaimed the duty of district courts to follow the court of appeals' previous *Erie* predictions as follows:

> By treating *Currie* as having no more than persuasive force, the district court made a fundamental error. In a hierarchical system, decisions of a superior court are authoritative on inferior courts. Just as the court of appeals must follow decisions of the Supreme Court whether or not we agree with them, so district judges must follow the decisions of this court whether or not they agree. A decision by a state's supreme court terminates the authoritative force of our decisions interpreting state law, for under *Erie* our task in diversity litigation is to predict what the state's highest court will do. Once the state's highest court acts, the need for prediction is past. But decisions of intermediate state courts lack similar force; they, too, are just prognostications. They could in principle persuade us to reconsider and overrule our precedent; assuredly they do not themselves liberate district judges from the force of our decisions.[25]

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23 *See Reiser*, 380 F3d at 1029-30.

24 *See Reiser*, 380 F3d at 1029.

25 *See Reiser*, 380 F.3d at 1029 (citations omitted).

The court of appeals declined to perform an *Erie* analysis, stating:

> We see little point in reexamining *Currie*. It represents an educated guess about how the Supreme Court of Illinois will rule. Instead of guessing over and over, it is best to stick with one assessment until the state's supreme court, which alone can *end* the guessing game, does so. . . .[26]

## REASONS FOR GRANTING THE PETITION

As addressed below, the *Reiser* opinion violates fundamental principles of federalism for several reasons; the Seventh Circuit has "legislated" a statute off the books; it is important to other persons in other litigation; it involves a recurring issue; it presents a split among courts of appeals concerning appropriate *Erie* standards when an *Erie* prediction is contrary to subsequent state intermediate appellate opinions; it presents a practice among courts of appeals of preventing district courts from considering recent state intermediate appellate opinions if the court of appeals has made a previous *Erie* prediction; it encourages forum shopping; it promotes inequitable administration of justice; and it is erroneous.

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26 *See Reiser*, 380 F.3d at 1029.

## A. *Reiser* Violates Fundamental Principles Of Federalism.

The court of appeals below violated principles of federalism, precedent of this Court, and acted contrary to the standards of other courts of appeals in several respects. The court of appeals failed to follow the two state intermediate appellate opinions without specifically identifying, weighing or analyzing that convincing persuasive data to support its failure to follow the state opinions.[27] Moreover, *Reiser* contradicts precedent of this Court by further devaluing subsequent state intermediate appellate court opinions. The court of appeals relegated intermediate court of appeals decisions to the role of showing "an obvious mistake" in a previous *Erie* prediction.[28] The court of appeals shirked its *Erie* duty to approach the issue of "implicit repeal" as reflected in current state law and rested instead on *stare decisis*.[29]

### 1. The Court Of Appeals' Standard Violated Principles Of Federalism By Refusing To Follow State Intermediate Appellate Opinions Without Conducting The Proper Analysis.

The court below followed a standard that violated principles of federalism by failing to adhere to intermediate appellate court

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27 *See Reiser*, 380 F.3d at 1029.
28 *See Reiser*, 380 F.3d at 1029-30.
29 *See Reiser*, 380 F.3d at 1029-30.

decisions without specifically identifying or analyzing convincing persuasive data that the Illinois Supreme Court would decide otherwise. This Court has held:

> Where an intermediate appellate state court rests its considered judgment upon the rule of law which it announces, that is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.[30]

The court of appeals should have identified persuasive data demonstrating that the Supreme Court of Illinois would not follow the two state appellate opinions.[31] Without such convincing persuasive data, the court of appeals should have adhered to the two intermediate state appellate opinions.[32] The court of appeals did neither.

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30 *West v. American Tel. & Tel.Co.*, 311 U.S. 223, 237, 61 S. Ct. 179, 183 (1941). *See also Six Companies of Cal. v. Joint Highway Dist.*, 311 U.S. 180, 188, 61 S. Ct. 186, 188 (1940) (same); *Fidelity Union Trust Co. v. Field*, 311 U.S. 169, 178-79, 61 S. Ct. 176, 178 (1940) (same); *Stoner v. New York Life Ins. Co*, 311 U.S. 464, 467, 61 S. Ct. 336, 338 (1940) (same).

31 *See West*, 311 U.S. at 237, 61 S. Ct. at 183 (requiring adherence to state intermediate appellate opinion absent other convincing persuasive data). *See also Six Companies of Cal.*, 311 U.S. at 188, 61 S. Ct. 186, 188 (same); *Field*, 311 U.S. at 178-79, 61 S. Ct. at 178 (same); *Stoner*, 311 U.S. at 467, 61 S. Ct. at 338 (same).

32 *See West*, 311 U.S. at 237, 61 S. Ct. at 183 (requiring adherence to state intermediate appellate opinion absent other convincing persuasive data). *See also Six Companies of Cal.*, 311 U.S. at 188, 61 S. Ct. at 188 (same);

As addressed below this and other violations of the principles of federalism also promulgates an erroneous *Erie* standard for every other federal court.

### 2. The Court of Appeals Stated A Legal Standard That Vastly And Unjustifiably Devalued The Relevance Of Two State Intermediate Appellate Opinions Directly On Point

The court below violated principles of federalism and this Court's precedent by relegating the role of subsequent intermediate appellate court opinions to merely demonstrating that the court of appeals' previous *Erie* guess "rested on some obvious error . . . ."[33] Moreover, the court of appeals stated that demonstrating such "obvious error" would simply induce the court of appeals "to look afresh at issues of state law."[34] To the contrary, this Court's precedent provides that state intermediate appellate opinions normally provide the basis for decision and does not limit such state opinions to simply demonstrating that an earlier *Erie* prediction was "obviously wrong."[35]

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*Field*, 311 U.S. at 178-79, 61 S. Ct. at 178 (same); *Stoner*, 311 U.S. at 467, 61 S. Ct. at 338 (same).

33 *See Reiser*, 380 F.3d at 1029-30.

34 *See Reiser*, 380 F.3d at 1029.

35 *See West*, 311 U.S. at 237, 61 S. Ct. at 183 (requiring adherence to state intermediate appellate opinion absent other convincing persuasive data). *See also Six Companies of Cal.*, 311 U.S. at 188, 61 S. Ct. 186, 188

### 3. The Court Of Appeals Failed To Make An *Erie* Prediction Based On Current State Law.

The court below violated principles of federalism by failing to reexamine the issue of "implicit repeal" of the state statute in light of current state law. The court of appeals rested opinions almost solely on *stare decisis* of its 16-year-old *Erie* guess.[36] The court of appeals' "standard" is incorrect. Precedent of this Court requires that an *Erie* prediction be made on the basis of current law.[37] Federal courts have the duty to consider new state appellate opinions.[38]

## B. *Reiser* Directly And Detrimentally Affects Other Litigants In Other Cases.

The court of appeals below agreed with the district judge's assessment that "many suits similar to this one are pending elsewhere."[39] The court of appeals noted that a decision in *Reiser* "could accelerate the disposition of many pieces of litigation."[40]

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(same); *Field*, 311 U.S. at 178-79, 61 S. Ct. at 178 (same); *Stoner*, 311 U.S. at 467, 61 S. Ct. at 338 (same).

36 *See Reiser*, 380 F.3d at 1029-30.

37 *See, e.g., Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538, 543, 61 S. Ct. 347, 350 (1941).

38 *See* CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 4507 n.43 (Westlaw 2004) (collecting cases from majority of courts of appeals).

39 *See Reiser*, 380 F.3d at 1029.

40 *See Reiser*, 380 F.3d at 1029.

## C. *Reiser* Represents A Recurring Violation Of Principles Of Federalism.

During the 16 years since *Currie* was decided, federal courts repeatedly have refused to recognize claims under section 4.1a of the state statute.[41] *Reiser* already has, and will continue, to write the state statute off the books in federal courts, while state courts enforce it.[42]

## D. *Reiser* Presents A Split Among Circuits Concerning *Erie* Standards When Subsequent State Intermediate Appellate Opinions Reject A Previous *Erie* Prediction.

*Reiser* presents a split in circuit authority about the use of state intermediate court of appeals opinions that are issued subsequent to a contrary *Erie* prediction. As noted, this Court requires that state intermediate appellate court opinions normally control unless a court is convinced otherwise by persuasive data.[43]

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41 *See Reiser*, 380 F.3d at 1029-30 (holding section 4.1a implicitly repealed); *Spann v. Community Bank*, No. 03 C 7022, 2004 Westlaw 691785, at *10 (N.D. Ill. 2004) (not designated for publication) (following *Currie* and holding section 4.1a implicitly repealed); *Krone v. 125 Home Loan Owner Trust*, No. 01-cv-0691-MJR, at 10 (S.D. Ill. filed Aug. 27, 2003) (citing *Currie* and holding section 4.1a implicitly repealed).

42 *See Reiser*, 380 F.3d at 1029-30 (holding section 4.1a implicitly repealed).

43 *See West*, 311 U.S. at 237, 61 S. Ct. at 183 (requiring adherence to state intermediate appellate opinion absent other convincing persuasive data). *See also Six Companies of Cal.*, 311 U.S. at 188, 61 S. Ct. at 188 (same); *Field*, 311 U.S. at 178-79, 61 S. Ct. at 178 (same); *Stoner*, 311 U.S. at 467, 61 S. Ct. at 338 (same).

Most circuits utilize this Court's standard.[44] *Reiser*, however, did not require the specific identification, valuation, or analysis of persuasive data in disregarding the state intermediate appellate opinions.[45]

### E. *Reiser* Unconstitutionally Prevents District Courts From Performing Their Duty To Consider State Intermediate Appellate Opinions If The Court Of Appeals Previously Made A Contrary *Erie* Prediction.

Whether a district court must ignore recent state intermediate appellate courts and automatically adhere to its court of appeals' 16-year-old *Erie* decision that is contrary to the recent state intermediate appellate opinions, presents an important issue concerning all federal courts of appeal and federal district courts. Notably, the increasing dilemma of district courts considering recent state intermediate appellate opinions due to their court of appeals' previous *Erie* prediction is not confined to the Seventh Circuit.[46]

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44 *See* CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 4507 n.43 (Westlaw 2004) (collecting cases from majority of courts of appeals).

45 *See Reiser*, 380 F.3d at 1029-30.

46 *See, e.g., FDIC v. Abraham*, 137 F.3d 264, 269 (5th Cir. 1998) (holding: "[w]e conclude then, that when our *Erie* analysis of controlling state law is conducted for the purpose of deciding whether to follow or depart from prior precedent of this circuit, and neither clearly contrary subsequent holding of the highest court of the state nor a subsequent statutory authority, squarely on point, is available for guidance, we should not disregard our own prior precedent on the basis of subsequent intermediate

*Reiser*, citing a Seventh Circuit opinion concerning mail fraud and wire fraud, states that district judges must follow the *Erie* predictions of their court of appeal, despite recent state intermediate appellate opinions to the contrary, simply because there is a hierarchy of federal courts.[47]

This practice of the courts of appeals should be brought to an end, in light of its unconstitutionality. By precluding district courts from considering recent state intermediate appellate court opinions in the name of *stare decisis*, courts of appeals are perpetuating their very own general federal common law. The practice is prohibited by *Erie* as violative of constitutional principles of federalism.[48] The practice circumvents the requirement that federal courts adhere to state intermediate appellate opinions absent convincing persuasive data to the contrary.[49] The practice violates the duty of federal

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state appellate court precedent unless such precedent comprises unanimous or near-unanimous holdings from several – preferably a majority – of the intermediate appellate courts of the state in question.").

47 *See Reiser*, 380 F.3d at 1029 (citing *United States v. Ramsey*, 785 F.2d 184 (7th Cir. 1986)).

48 *See Erie*, 304 U.S. at 78-81, 58 S. Ct. at 822-23 (holding that pre-*Erie* decisions intruded upon independence of states without constitutional power or justification).

49 *See West*, 311 U.S. at 237, 61 S. Ct. at 183 (requiring adherence to state intermediate appellate opinion absent other convincing persuasive data). *See also Six Companies of Cal.*, 311 U.S. at 188, 61 S. Ct. at 188 (same);

judges to apply current state law to the proceedings over which they preside.[50] Moreover, the practice undercuts the *Erie* conclusion that for the same transaction, the accident of a suit in federal court, instead of in a state court in the same locale, should not lead to a substantially different result.[51]

Allowing *Reiser* to stand will unjustifiably allow courts of appeals to perpetuate their modern version of general federal common law and its unconstitutional intrusion into state judicial independence.

## F. *Reiser* Encourages Forum Shopping And Inequitable Administration Of The Law.

*Reiser* will cause forum shopping. *Reiser* forces rational litigants to file their claims under section 4.1a in state court rather in federal court. *Reiser*'s *Erie* application thus creates a chief evil which is supposed to be eliminated – not created – by application of

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*Field*, 311 U.S. at 178-79, 61 S. Ct. at 178 (same); *Stoner*, 311 U.S. at 467, 61 S. Ct. at 338 (same).

50 *See, e.g., Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. at 543, n.21, 61 S. Ct. at 350, n.21 (holding, "[W]e are of the view that, until such time as a case is no longer sub judice, the duty rests upon federal courts to apply the state law under the Rules of Decision statute in accordance with the then controlling decision of the highest state court" and noting the rule applies to state intermediate courts).

51 *See Bernhardt v. Polygraphic Co. of Am., Inc.*, 350 U.S. 198, 204, 76 S. Ct. 273, 276-77 (1956).

*Erie* principles.[52] The continued result is certainly outcome-determinative.

## G. *Reiser* Stifles Federal Claims.

*Reiser* discourages rational suitors who wish to pursue section 4.1a claims from seeking remedies enacted by the United States Congress. Once driven by *Reiser* to state court, a claimant with a section 4.1a claim will not be able to allege any viable claim under any United States statute, due to the certainty of removal. Claimants may join federal claims under statutes such as TILA,[53] RESPA,[54] and HOEPA[55] to a 4.1a claim, as did petitioners here. Such allegations support "federal question" jurisdiction.[56] An attorney who alleges such additional claims in the face of *Reiser*, however, will subject his client's case to certain removal to federal court, and dismissal of the section 4.1a claim.

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52 *See Erie*, 304 U.S. at 820-821, 58 S. Ct. at 74-75 (describing forum shopping encouraged by pre-*Erie* precedent); *Bernhardt v. Polygraphic Co. of Am., Inc.*, 350 U.S. 198, 204, 76 S. Ct. 273, 276-77 (1956) ("The nub of the policy that underlies *Erie R..R.. Co. v. Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away, should not lead to a substantially different result.") (quoting *Guaranty Trust Co. of N.Y. v. York*, 326 U.S. 99, 109, 65 S. Ct. 1464, 1470 (1945)).

53 *See* 15 U.S.C. § 1601, *et seq.* (Truth in Lending Act).

54 *See* 12 U.S.C. § 2601, *et seq.* (Real Estate Settlement Practices Act).

55 *See* 15 U.S.C. § 1640(e) (Home Owners' Equity Protection Act).

56 *See* 28 U.S.C. § 1331.

## H. The Result Below Is Erroneous.

Two intermediate appellate opinions subsequent to the 16-year-old *Currie* opinion have rejected *Currie*.[57] Each holds that section 4.1a is not implicitly repealed.[58] As quoted above, the first subsequent state intermediate appellate opinion, *Hicks*, held that section 4 and section 4.1a of the Illinois Interest Act can reasonably be reconciled.[59] Consistent with principles of federalism, implicit repeal is disfavored.[60] A court should make every effort, as the *Hicks* court did, to reconcile the allegedly inconsistent statutory provisions.[61] *Clark*, the second subsequent intermediate appellate opinion recently held that the *Hicks* result is correct.[62] There appears to be no confusion in the Illinois decisions, no developing line of authorities that casts a shadow over the established ones, no dicta,

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57 *See U.S. Bank Nat'l Assoc. v. Clark*, 807 N.E.2d 1109, 1118 (Ill. App. Ct. 2004), *pet. for rev. filed* May 5, 2004 (Ill.); *Fidelity Fin. Serv., Inc. v. Hicks*, 574 N.E. 2.d 15, 19 (Ill. App. Ct. 1991).

58 *See Fidelity Fin. Serv., Inc. v. Hicks*, 574 N.E. 2.d 15, 19 (Ill. App. Ct. 1991).

59 *See Fidelity Fin. Serv., Inc. v. Hicks*, 574 N.E. 2.d 15, 19 (Ill. App. Ct. 1991).

60 *See Lily Lake Road Defenders v. County of McHenry*, 619 N.E.2d 137 (1993).

61 *See Fidelity Fin. Serv., Inc. v. Hicks*, 574 N.E.2.d 15, 19 (Ill. App. Ct. 1991) ("Because reasonable interpretations reconcile the statutes, we decline to repeal Section 4.1a by implication").

62 *See U.S. Bank Nat'l Assoc. v. Clark*, 807 N.E.2d 1109, 1118 (Ill. App. Ct. 2004), *pet. for rev. filed* May 5, 2004 (Ill.).

doubts or ambiguities concerning the opinion of Illinois judges on the question and no legislative development that promises to undermine the judicial rule.[63]

The duty of the court below was to consider the two subsequent state cases and to normally adhere to them absent other convincing countervailing persuasive data, which it failed to do.[64] The court of appeals below instead justified and followed its own opinion and determination of the law, albeit 16 years old and contrary to current state law.[65] Federal courts exercising diversity jurisdiction do not follow their own opinion of what state law should be simply because they think it best.[66] It was not the function of the court of appeals below to honor its own "general federal common

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63 *See Bernhardt v. Polygraphic Co. of Am., Inc.*, 350 U.S. at 205, 76 S. Ct. at 278 (1956).

64 See West, 311 U.S. at 237, 61 S. Ct. at 183 (requiring adherence to state intermediate appellate opinion absent other convincing persuasive data). *See also Six Companies of Cal.*, 311 U.S. at 188, 61 S. Ct. at 188 (same); *Field*, 311 U.S. at 178-79, 61 S. Ct. at 178 (same); *Stoner*, 311 U.S. at 467, 61 S. Ct. at 338 (same). *See also Reiser*, 380 F.3d at 1029-30 (refusing to identify, evaluate, or analyze persuasive data before refusing to adhere to state intermediate appellate opinions on point).

65 *See Reiser*, 380 F.3d at 1029-30.

66 *See West*, 311 U.S. at 236-37, 61 S. Ct. at 183 (stating, "[A] federal court is not free to reject the state rule merely because it has not received the sanction of the highest state court, even though it thinks the rule is unsound in principle or that another is preferable.").

law" as contained in *Currie*.[67] It was not the function of the federal court of appeals to legislate a state statute – recognized in state courts – off the books by the disfavored doctrine of "implicit repeal."[68] To the contrary, federal courts sitting in diversity determine the content of state law on the basis of state law – normally following state intermediate courts of appeal absent convincing counterveiling persuasive data -- and the judgment of the court of appeals below is erroneous for the court of appeals' failure to do so.

## CONCLUSION

The petition for a writ of certiorari should be granted.

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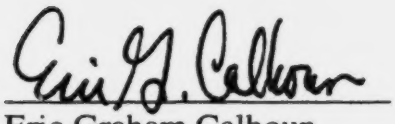
67 *See Erie*, 304 U.S. at 78, 58 S. Ct. at 822 ("There is no federal general common law, and federal courts have no constitutional power to declare substantive rules of common law applicable in state.").

68 *See Erie*, 304 U.S. at 78-79, 58 S. Ct. at 822-23 (stating that due to constitutional provisions for autonomy and independence of states, "Supervision over either the legislative or the judicial action of the states is in no case permissible except as to matters by the constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the state, and, to that extent, a denial of its independence.").

Respectfully submitted,



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November 17, 2004

**Appendix A**
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In the
United States Court of Appeals
for the Seventh Circuit

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No. 04-8017

EDWARD and PAMELA REISER,
and JANET GREENLEE,

*Plaintiffs-Appellees,*

v.

RESIDENTIAL FUNDING CORPORATION,

*Defendant-Appellant.*

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On Petition for Permission to Appeal from the United States District Court for the Southern District of Illinois.
No. 03.CV-0619-DRH-**David R. Herndon**, *Judge.*

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SUBMITTED AUGUST 6, 2004-DECIDED AUGUST 19, 2004

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Before BAUER, EASTERBROOK, and MANION, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* After denying a motion to dismiss the complaint under Fed.R.Civ.P. 12(b)(6), the district court certified its order for interlocutory appeal under 28 U.S.C. §1292(b). Defendant has filed the necessary petition, which we grant in part and summarily reverse so that the remainder of the suit may proceed without delay.

Plaintiffs, who secured second mortgages from Mortgage Capital Resources Corp., contend in this suit that the lender violated two federal statutes (the Truth in Lending Act and the Real Estate Settlement Procedures Act) plus the Illinois Interest Act. The federal claims assert that Mortgage Capital charged excessive closing fees and engaged in forbidden fee splitting. The state claim is that by charging more than three points at closing Mortgage Capital exceeded a limit set by 815 ILCS 205/4.1a. Neither Mortgage Capital nor any other participant in the extensions of credit has been named as a defendant; instead plaintiffs seek relief from Residential Funding Corporation, which purchased the plaintiffs' notes as part of larger pools. Normally the holder-in-due-course doctrine would foreclose litigation against the purchaser, but a portion of the Home Ownership and Equity Protection Act overrides this doctrine for high-interest mortgage loans, providing that a person "who purchases or is otherwise assigned a mortgage referred to in [15 D.S.C. §1602(aa)] shall be subject to all claims and defenses with respect to that mortgage that the consumer could assert against the creditor of the mortgage". 15 U.S.C. §1641(d)(1). The complaint alleges, and Residential Funding does not deny, that the loans are high-interest mortgages covered by §1602(aa).

Residential Funding contends that the complaint does not state a claim under Illinois law because 815 ILCS 205/4.1a was repealed in 1981 by another statute lifting the cap on mortgage interest rates. We agreed with this position in *Currie v. Diamond Mortgage Corp.*, 859 F.2d 1538, 1542-43 (7th Cir. 1988), holding that it would be so odd to limit points, when straight interest rates are unlimited, that Illinois must be understood to have repealed the points cap implicitly. Both the Attorney General of Illinois and the agency that regulates banking under Illinois law have issued advisory opinions to the same effect. But in this case the district judge refused to follow *Currie*. The judge wrote that he found

two decisions by the state's five intermediate appellate courts more persuasive than *Currie* and elected to follow them instead. *See U.S. Bank N.A. v. Clark*, 807 N.E.2d 1109 (Ill. App. 1st Dist. 2004); *Fidelity Financial Services, Inc.v. Hicks*, 214 Ill. App. 3d 398,574 N.E.2d 15 (Ill. App. 1st Dist. 1991). Recognizing that other district judges in this circuit continue to enforce *Currie*, and that many suits similar to this one are pending elsewhere, the district judge sensibly concluded that a prompt decision under §1292(b) could accelerate the disposition of many pieces of litigation. We agree with that conclusion and therefore grant the petition for permission to appeal.

By treating *Currie* as having no more than persuasive force, the district court made a fundamental error. In a hierarchical system, decisions of a superior court are authoritative on inferior courts. Just as the court of appeals must follow decisions of the Supreme Court whether or not we agree with them, see *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997); *Rodriguez de Quijas v. Shearson/ American Express, Inc.*, 490 U.S. 477, 484 (1989), so district judges must follow the decisions of this court whether or not they agree. *See United States v. Ramsey*, 785 F.2d 184 (7th Cir. 1986). A decision by a state's supreme court terminates the authoritative force of our decisions interpreting state law, for under *Erie* our task in diversity litigation is to predict what the state's highest court will do. Once the state's highest court acts, the need for prediction is past. But decisions of intermediate state courts lack similar force; they, too, are just prognostications. They could in principle persuade us to reconsider and overrule our precedent; assuredly they do not themselves liberate district judges from the force of our decisions.

We see little point in reexamining *Currie*. It represents an educated guess about how the Supreme Court of Illinois will rule. Instead of guessing over and over, it is best to stick with one assessment until the state's supreme court, which alone can end the guessing game, does so. Illinois has an internal division on this issue, with two judicial decisions set against the views of two executive officials. The state must resolve this conflict internally; restlessness at the federal level serves no useful purpose. This is not to say that

decisions of intermediate state courts *never* could induce us to look afresh at issues of state law; a decision demonstrating that our initial resolution rested on some obvious error would do the trick. *Clark* and *Hicks* do not show this, however. They give more weight than *Currie* to the principle that repeals by implication are disfavored, but the canon is not something that *Currie* overlooked; our opinion discussed its significance. *Clark* also thought it significant that §4.1a was reenacted in 1992. But this occurred as part of a general recodification, a process that is not supposed to cause substantive change. Inclusion of both conflicting statutes in the project does not change their relative weight.

*Clark* said, and plaintiffs also contend, that *Currie* was dictum. That's wrong. *Currie* contains two holdings: that §4.1a has been repealed by implication, and that it was preempted by federal regulations applicable to the lender in that suit. There is a big difference between dicta and alternative holdings. Plaintiffs make an additional argument: that *Currie* has been overruled by *Jackson v. Resolution GGF Oy*, 136 F.3d 1130 (7th Cir. 1998). That's wrong too. The lender in *Jackson* relied on an opinion, issued by the Legal Counsel of the state's Department of Financial Institutions, that had followed *Currie*. We held that reliance on such an opinion prevents relief against a lender. Doubtless the lender could have relied on *Currie* directly, but we take litigation as the parties present it; defendant in *Jackson* wanted a resolution that would protect it even if the Supreme Court of Illinois ultimately disagrees with our decision in *Currie*. We held that the lender was entitled to that protection. Nothing in Jackson suggests dissatisfaction with, let alone overrules, the holding of *Currie*. And, for the reasons already given, it is not prudent for a federal appellate court to revisit an issue of state law that the state's supreme court has left unresolved.

As for the claims based on federal law: Residential Funding contends that they are untimely under the oneyear periods of limitations contained in both the TILA and the RESPA. The loans were made in 1999 and the suit was not filed until 2003, but the district judge concluded that plaintiffs may be able to demonstrate that the acts of Mortgage Capital justify either equitable tolling or

equitable estoppel. *See Cada v. Baxter Healthcare Corp.*, 920 F.2d 446 (7th Cir. 1990). Residential Funding insists that the period of limitations is a personal defense and hence is unaffected by 15 D.S.C. §1641(d)(1). Whether the sins of a lender may be used to extend the period available to sue a holder in due course is a question that eventually may require resolution, but it is too soon to tackle the issue. All we have to go on is the complaint, and because the period of limitations is an affirmative defense it is rarely a good reason to dismiss under Rule 12(b)(6). *See, e.g., Xechem, Inc. v. Bristol-Myers Squibb Co.*, 372 F.3d 899 (7th Cir. 2004) (collecting authority). Maybe Residential Funding has itself done something that warrants tolling. Maybe plaintiffs will be unable to prove that Mortgage Capital's acts justify tolling or estoppel. Only if plaintiffs can demonstrate justification for delay in suing Mortgage Capital, but cannot demonstrate an equivalent justification for delay in suing Residential Funding, does the effect of §1641(d)(1) matter. It is best to await a final decision rather than leap into a subject that evidence may cast in a new light.

The petition for leave to appeal is granted, limited to the claim under the Illinois Interest Act. With respect to that subject the decision is reversed, and the case is remanded with instructions to dismiss the complaint to the extent it relies on 815 ILCS 205/4.1a. The petition for leave to appeal otherwise is denied.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

**Appendix B**
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**United States Court of Appeals**

For the Seventh Circuit

Chicago, Illinois 60604

JUDGMENT - WITHOUT ORAL ARGUMENT

**Date: August 19, 2004**

**BEFORE:** Honorable WILLIAM J. BAUER, Circuit Judge

Honorable FRANK H. EASTERBROOK, Circuit Judge

Honorable DANIEL A. MANION, Circuit Judge

No. 04-8017

IN RE:

RESIDENTIAL FUNDING CORPORATION, also known as GMAC-RFC,
Petitioner

Appeal from the United States District Court for the
Southern District of Illinois
No. 03 C 619, David R. Herndon, Judge

The petition for leave to appeal is GRANTED, limited to the claim under the Illinois Interest Act. With respect to that subject the decision is REVERSED, and the case is REMANDED with instructions to dismiss the complaint to the extent it relies on 815 ILCS 204/4.1a. The petition for leave to appeal otherwise is DENIED. The above is in accordance with the decision of this court entered on this date.

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF ILLINOIS

EDWARD and PAMELA REISER, and
JANET GREENLEE, individually and on
behalf of all others similarly situated,

Plaintiffs,

v.

RESIDENTIAL FUNDING CORPORATION
a/k/a GMAC-RFC,

Defendant. No. 03-CV-0619-DRH

**MEMORANDUM AND ORDER**

**HERNDON, District Judge:**

## I. Introduction and Background

Now before the Court is Defendant Residential Funding Corporation's motion to dismiss (Doc. 26). Based on the following, the Court denies the motion.

On February 13, 2004, Plaintiffs, individually and on behalf of all others similarly situated. filed a First Amended Complaint against Residential Funding Corporation a/k/a GMAC-RFC ("RFC") for violations of the Illinois Interest Act, **815 ILCS 205/4.1**. violations of the Truth in Lending Act. **15 U.S.C. § 1601** ***et seq***.

("TILA"), as amended by the Home Ownership Equity Protection Act. **15 U.S.C. § § 1635, 1639, & 1640** ("HOEPA") violations of the Real Estate Settlement Protection Act, **12 U.S.C. § 2601** et seq. ("RESPA"), Conspiracy, Common Law Fraud and violations of the Illinois Consumer Fraud Act, **815 ILCS 505/1 et seq.** (Doc. 23).[1] Plaintiffs allege the second mortgage loans they obtained from Mortgage Capital Resource Corporation ("Mortgage Capital") included illegal and deceptive charges and that RFC, which took assignment of the second mortgage notes, is liable for Mortgage

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1 Plaintiffs purport to represent two different classes of individuals: (A) The Illinois Class: all residents of the state of Illinois, (1) who were sold second mortgage loans by Mortgage Capital, which were secured by residential real estate in the State of Illinois and had an interest rate in excess of 8% per annum and origination fees charged that exceed 3% of the principal amount of the loan calculated pursuant to the Illinois Interest Act; (2) whose loans were subsequently transferred or assigned to GMAC-RFC; and (3) (i) whose last scheduled payment of the loan, after giving effect to any renewals or extensions, was due later than two years prior to the filing of this Complaint; or (ii) if the total amount due under the terms of the loan contract was fully paid, it was paid later than two years prior to the filing of this Complaint; and (B)The National Class: all borrowers that were sold second mortgage loans from Mortgage Capital secured by real property anywhere in the United States, where the loan meets the definition of a high-cost mortgage set forth at 15 U.S.C. § § 1602(aa), and were subsequently transferred or assigned to GMAC-RFC. The National Class makes claims in part pursuant to RESPA and TILA. as amended by HOEPA. Specifically excluded from the National Class are borrowers with loans secured by real property in the State of Missouri. As of this date, the classes have not been certified, thus the case is not proceeding as such.

Capital's violations of Illinois law and federal law.

Plaintiffs Edward and Pamela Reiser, a married couple, and Janet Greenlee reside in Illinois (Doc. 23, ¶¶ 12-13). The Reisers and Greenlee obtained second mortgages from Mortgage Capital (Doc. 23, ¶¶ 60 & 63). The Reisers' second mortgage was for $34,000 and had an interest rate of 13.125% while Greenlee's second mortgage was for was for $35,000 and had an interest rate of 17.25% (Doc. 23, ¶ 61 & 63). Both mortgages charged various items as "fees", including origination fees, loan discount fees, processing fees, underwriting fees and document preparation fees, coupled with non bona fide closing costs (Doc. 23, ¶¶ 61 & 63). Plaintiffs describe these loans as "High Loan to Value" loans ("HL TV loans") because they are secured by a second mortgage on residential property where the total outstanding debt on the dwelling often exceeds the fair market value of the property (Doc. 23, ¶ 29).

Each note and mortgage secured by Plaintiffs included provisions that the rights and duties of Mortgage Capital were assignable and that the laws of the state of where the property was located would govern the mortgages (Doc. 23, ¶¶ 33 & 34). Plaintiffs

maintain that Mortgage Capital did not maintain its own loan portfolio; rather the loans were pooled and sold to investors either through bulk loan sales or by securitizing the loans into pools of mortgaged-backed securities (Doc. 23, ¶ 35). Plaintiffs contend that Mortgage Capital used Johnson & Payne, PLC (Mortgage Capital's purported settlement agent) as a tool to funnel fraudulent settlement charges to Mortgage Capital and its officers (Doc. 23, ¶ 69). Plaintiffs further allege that Mortgage Capital, Johnson & Payne, and Kenneth Ketner, CEO of Mortgage Capital, conspired with each other to mislead borrowers and others concerning the kickback arrangement with Johnson & Payne, inflated finder fees and closing charges, and that they deliberately prepared misleading and inaccurate HUD 1 settlement statements (Doc. 23, ¶ 70). Plaintiffs allege that RFC is liable by way of the Home Ownership and Equity Protection Act, **15 U.S.C. § 1641 (d)**.[2]

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2 Section 15 U.S.C. § 1641(d)(l) states: "Any person who purchases or is otherwise assigned a mortgage referred to in Section 1602(aa) of this title shall be subject to all claims and defenses with respect to that mortgage that the consumer could assert against the creditor of the mortgage that the consumer could assert against creditor of the mortgage, unless the purchaser or assignee demonstrates. . . that a reasonable person exercising ordinary due diligence could not determine, based on the documentation required by this subchapter . . . that the mortgage was a Section 1602(aa) high cost mortgage.

With regard to the Named Plaintiffs, the amended complaint alleges that on October 30, 1999, the Reisers obtained a twenty-five year second mortgage home equity loan from Mortgage Capital in the principal amount of $34,000.00 and that on November 4, 2024 (the last scheduled payment date), the Reisers will have paid a total of $116,001.00 on the loan including $85,571.00 in interest. The amended complaint further alleges that Greenlee also obtained a twenty-five year second mortgage home equity loan from Mortgage Capital in the principal amount of $35,000.00 and that on November 24, 2004 (the last scheduled payment date), Greenlee will have paid $153,051.00 on the loan and including $121,971.00 in interest.

RFC moves to dismiss the First Amended Complaint, arguing that it fails to state any claim upon which relief can be granted. Specifically, RFC argues that the section of the Illinois Interest Act upon which Plaintiffs sue has been impliedly repealed; that Plaintiffs' TILA RESPA and Consumer Fraud claims are barred by the applicable statute of limitations and/or repose; that Plaintiffs have failed to adequately plead fraudulent concealment and/or equitable tolling; and that the conspiracy and common-law fraud claims are

barred for failure to adequately plead the requisite factual elements. Plaintiffs oppose the motion. The Court rules as follows.

## II. Motion to Dismiss Standard

When reviewing a motion to dismiss under Rule 12(b)(6), the Court merely looks at the sufficiency of the complaint, **Swierkiewicz v. Sorema N.A., 534 U.S. 506, 508,122 S.Ct. 992,152 L.Ed.2d 1 (2002); Autry v. Northwest Prem. Servs., Inc., 144 F.3d 1037, 1039 (7th Cir. 1998)**; it does not decide whether the plaintiff has a winning claim. **Herdrich v. Pegram, M.D., 154 F.3d 362,369 (7th Cir. 1998); see also McCormick v. City of Chicago, 230 F.3d 319, 323-26 (7th Cir. 2000) (analyzing Leatherman v. Tarrant County, 507 U.S. 163, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993) and reversing the Rule 12(b)(6) dismissal of claims based on §§ 1981 & 1983); Bennett v. Schmidt, 153 F.3d 516, 518 (7th Cir. 1998) ("Complaints need not plead law or match facts to every element of a legal theory....")**. Thus. "[a] complaint should not be dismissed for failure to a state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts to support his claim which would entitle him to relief." **Smith v. Cash Store Mgmt., Inc., 195 F.3d 325,327 (7th Cir. 1999) (citations and internal quotation marks**

**omitted).** "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims ... Rule 12(b)(6) should, be employed only when the complaint does not present a legal claim." **Id.** "This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of un meritorious claims." **Swierkiewicz, 534 U.S. at 512, 122 S.Ct. 992**. All well-pleaded facts are accepted as true, and all reasonable inferences are drawn in favor of the plaintiff. **See e.g. Jackson v. E.J. Brach Corp., 176 F.3d 971, 977-78 (7th Cir. 1999).**

As a general rule, the Court must consider only the allegations made on the face of the complaint when ruling on a motion to dismiss. See **FED.R.CIV.P. 12(b)(6).** This includes documents the plaintiff has attached to the complaint. See **FED.R.CIV.P. 10(e)**. If matters outside the pleadings are placed before the district court, the court must convert the defendant's 12(b)(6) motion into a motion for summary judgment under FED.R.CIV.P. 56. **See Carter v. Stanton, 405 U.S. 669, 671, 92 S.Ct. 1232, 31 L.Ed.2d 569 (1972); see also Venture Assoc. Corp. v. Zenith Data Sys.Corp., 987 F.2d 429, 431 (7th Cir. 1993)**. As an

exception to the general rule, the Seventh Circuit has held that documents attached to a motion to dismiss are considered to be part of the pleadings if they are referred to in the plaintiffs complaint and are central to his claim. **See id. at 431-32; see also Wright v. Associated Ins. Cos., Inc., 29 F.3d 1244, 1248 (7th Cir. 1994).** Although the plaintiff is under no obligation to attach documents relating to her claim, a defendant may introduce certain documents if the plaintiff has failed to do so. **Venture Assocs. Corp., 987 F.2d at 431.** "Such documents may be considered by a district court in ruling on the motion to dismiss." **Wright, 29 F.3d at 1248.**

## III. Analysis

### A. Illinois Interest Act

First, RFC argues that the Court should dismiss Plaintiffs' claims that are based on § 4.1a(f) of the Illinois Interest Act because that section has been impliedly repealed. The Court rejects this argument. Earlier this year, this undersigned district judge addressed this exact issue in **Landmann v. Bann-Cor, 2001-CV-0417-DRH (Doc. 148; February 26. 2004)**. This Court found that section 4.1a(f) of the Illinois Interest Act had not been repealed. Specifically, this

Court held:

> The Court agrees with Judge Coar's conclusion that although. . . the reasoning of Currie is persuasive. . . the Illinois Supreme Court would most likely adopt the results in the Hicks decision based upon the legislature's 1991 amendments to sections ~ and 4.1a and the principle that repeal by implication is strongly disfavored. Thus, the Court finds that the Named Plaintiffs may pursue their § 4.1a(f) claim against the remaining Defendants.

**Id. at p.15 (quoting Jackson v. Resolution GGF OY. 1995 WL 562120. * 6 (N.D. Ill. September 20. 1995)).** Moreover, on March 31, 2004, the Illinois Court of Appeals for the First District (the same Court that decided **Fidelity Financial Services. Inc. v. Hicks. 574 N.E.2d 15 (Ill. App. 1991))** considered the issue of whether the federal Depository Institutions Deregulation and MonetaryControl Act of 1980 ("DIDMCA"), **12 U.S.C. § 1735 et seq**. preempted § 4.1a of the Illinois Interest Act. **U.S. Bank National Association v. Clark, 2004 WL 637521 (Ill. App. March 31, 2004)**. The Illinois Appellate Court found that the DIDMCA and did not preempt § 4.1a. **Id. at * 5.** Implicit in that decision is the recognition – and reaffirmation - that § 4.1a of the Illinois Interest Act is still viable despite the Seventh Circuit's holding in **Currie v. Diamond Mortgage Corp. of Illinois, 859 F.2d 1538, 1542 (7th Cir. 1988).**

Thus, the Court finds that Plaintiffs may bring a cause of action against RFC for violations of the Illinois Interest Act. Therefore, the Court denies RFC's motion to dismiss regarding violations of the Illinois Interest Act claims.

**B. Statute of Limitations Argument**

Next, RFC argues that TILA and RESPA's one year statute of limitations and the ICFA's three year statute of limitations bars Plaintiffs' claims.[3] Further, RFC argues that Plaintiffs have not plead facts sufficient to establish equitable tolling or fraudulent concealment against RFC. Plaintiffs complain of events that took place in 1999 but they did not file their complaint until 2003. Thus, at first glance their complaint appears to be 3 years and 1year. respectively, untimely. Plaintiffs, however, Plaintiffs argues that the statute of limitations should be tolled for their claims on both grounds of fraudulent concealment and equitable tolling.

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3 Both TILA and RESPA each have a one year statute of limitations period. **15 U.S.C. § 1640e; 12 U.S.C. § 2614**. The ICFA has a three year statute of limitations. **815 ILCS 505/10a(e).**

Here, the Court finds that TILA and RESPA are subject to equitable tolling. **See Lawyers Title Ins. Corp. v. Dearborn Title Corp., 118 F.3d 1157 (7th Cir. 1997).** Thus, the Court must decide whether Plaintiffs' claims should be tolled.

There are two doctrines that can be invoked by plaintiffs to toll the running of the period of limitations: 1) equitable tolling, and 2) fraudulent concealment, also known as equitable estoppel. **Cada v. Baxter Healthcare Corp., 920 F.2d 446, 450-51 (1991).** The doctrine of equitable tolling allows a plaintiff to toll the statute of limitations if "despite all due diligence he is unable to obtain vital information bearing on the existence of his claim." **Cada, 920 F.2d at 450.** The Seventh Circuit describes the doctrine in **Cada** stating that under the doctrine a "plaintiff is assumed to know that he has been injured. so that the statute of limitations has begun to run; but he cannot obtain information necessary to decide whether the injury is due to wrongdoing." Thus the court limits the doctrine to where the plaintiff knows that he was injured during the limitations period, but does not know he had a claim against the defendant. Although other Seventh Circuit cases do not specifically include that the plaintiff must know of the injury within the limitations period.

neither do the other opinions contradict such a distinction. **See Mitchell v. Donchin, 286 F .3d 447, 451 (7th Cir .2002) (stating that the doctrine "turns on whether a reasonable person would be aware of the possibility of a claim") (quoting Hentosh, 167 F.3d at 1175); Teamsters & Employers Welfare Trust of Illinois v. Gorman Bros. Realty Mix, 283 F.3d 877,884 (7th Cir.2002) (stating that doctrine applies where plaintiff cannot "obtain information that he needs in order to be able to sue within the statutory period."); Sharp v. United Airlines, Inc., 236 F.3d 368, 373 (7th Cir.2001) (stating that doctrine applies when plaintiff "is unable to obtain enough information to conclude that he may have a discrimination claim."); Shropshear v. Corp. Counsel of the City of Chicago, 275 F.3d 593, 595 (7th Cir.2001) (stating that the doctrine applies "if it would have been unreasonable to expect [the plaintiff) to be able to sue earlier."); Hentosh, 167 F.3d at 1174 (stating that doctrine "often focuses on the plaintiffs excusable ignorance of the limitations period and on the lack of prejudice to defendant") (quoting Wheeldon v. Monon Corp., 946 F.2d 533,537 (7th Cir.1991); Chapple v. National Starch and Chemical Co. and Oil, 178 F.3d 501,506 (7th Cir.1999) (stating**

**that equitable tolling doctrine applies when the plaintiff was not aware within the limitations period "of the possibility that [his] rights [had been] violated").**

To successfully invoke the doctrine of fraudulent concealment and toll a statute of limitations a plaintiff must establish that the defendant took "active steps to prevent the plaintiff from suing in time...." **Cada, 920 F.2d at 450-51**. The "active steps" must be "above and beyond the wrongdoing upon which the plaintiffs claim is founded...." **Mitchell v. Donchin, 286 F.3d 447,450 (7th Cir.2002); see also Jackson v. Rocliford Housing Authority, 213 F.3d 389, 394 (7th Cir.2000) (stating that equitable estoppel only applies when "defendant, in addition to committing the alleged wrong giving rise to the suit, has also tried to prevent the plaintiff from suing in time.")**. Two common examples of such fraudulent concealment would be concealing evidence or promising not to invoke a statute of limitations defense. **Id.** To the extent that concealment is part of the original fraud. the concealing acts merely "postpone the date of accrual by preventing the plaintiff from discovering that he is a victim of fraud." **Cada, 920 F.2d at 450 51.**

As to equitable tolling, Plaintiffs argue that the kickbacks are tricks are contrivances intended to exclude suspicion. Plaintiffs contend that the kickbacks are misleading, deceptive, otherwise contrived actions or schemes which are inherently self concealing acts. As to the fraudulent concealment, Plaintiffs assert that a sham entity that was created and operated to funnel secret kickbacks to Defendant support the theory of active fraud. Here, Plaintiffs' First Amended complaint alleges that MRC made numerous misrepresentations and concealed material facts. *inter alia.*

a. Mortgage Capital misrepresented that Johnson & Payne was serving as settlement agent in connection with Plaintiffs' loans;
b. Mortgage Capital misrepresented to Plaintiffs that it was paying $450.00 to Johnson & Payne for services as settlement agent;
c. Mortgage Capital concealed from Plaintiffs the fact that Mortgage Capital was controlling the disbursement of funds to alleged third parties referred to on the HUD-l statements provided to Plaintiffs in connection with their loans;
d. Mortgage Capital concealed the fact that the alleged settlement agent, Johnson & Payne. shared offices with Mortgage Capital and that Mortgage Capital controlled Johnson & Payne's trust account;
e. Mortgage Capital concealed from Plaintiffs the fact that there was no independent settlement agent ensuring that third party charges represented on the HUD-l financial closing statements were bona-fide third party charges paid to third parties at closing;

(Doc. 23. ¶ 67). Furthermore, Plaintiffs allege that they "had no reason to suspect that the above information was concealed from them in connection with their loans. Certainly, Plaintiffs had no reason to suspect that Johnson & Payne was a tool that Mortgage Capital used to funnel fraudulent settlement charges to Mortgage Capital and its officers. Plaintiffs exercised the normal diligence that could be expected of a consumer borrower. Plaintiffs reviewed their loan documents and reasonably relied upon the accuracy of the statements contained therein. They has no basis to know that the thousands of dollars in various fees they were paying were fictitious charges that went into Mortgage Capital and its co-conspirators [sic] pockets." (Doc. 23, ¶ 68). Based on the pleadings, the Court finds that Plaintiffs have pled equitable tolling and fraudulent concealment with the required specificity. Thus, the issue of equitable tolling of the statute of limitations as to the TILA, RESPA and ICFA claims is one fact that survives the motion to dismiss.

**C. Common Law Fraud**

In order to state a cause of action for common law fraud, the essential elements of fraud must be pleaded with specificity. Under Illinois law, there are six elements of common law fraud. Ultimately,

a plaintiff must show that (1) defendant made a false statement of material fact, (2) defendant knew or believed the statement was false. (3) plaintiff had a right to rely upon the statement, (4) plaintiff did rely on the statement, (5) defendant made the statement for the purpose of inducing plaintiff to act, and (6) plaintiffs reliance led to plaintiffs injury. **Cramer v. Insurance Exchange Agency, 675 N.E.2d 897, 905 (Ill. 1996).**

Here, the Court finds that Plaintiffs stated a claim for common law fraud. Plaintiffs allege that MCR made misrepresentations and commissions of material facts intended to induce them to enter into loan transactions with MCR. That they relied on those misrepresentations and omissions and that as a result they were injured. Specifically, Plaintiffs allege that the false representations included "the statement that Johnson & Payne was being paid $450 for providing settlement services in connection with the loans. Mortgage Capital also misrepresented the cost of the charges in the HUD-1 disclosure statements. Mortgage Capital also misrepresented the various services, such as credit reports, were

obtained when the [sic] were not." (Doc. 23. ¶ 112). Thus, the Court denies RFC's motion to dismiss the common law fraud claim.

**D. Illinois Consumer Fraud Act**

In order to show a violation of the ICF A, a plaintiff must show "(1) a deceptive act or practice, (2) intent on the defendants' part that plaintiff rely on the deception, and (3) the deception occurred in the course of conduct involving trade or: commerce." **Siegel v. Levy Org. Dev. Co., 607 N.E.2d 194, 198 (Ill. 1992).**

Here, the Court finds that Plaintiffs have stated a cause of action under the ICFA. Plaintiffs allege "closing costs charged by Mortgage Capital did not bear a reasonable relationship to costs incurred by Mortgage Capital for providing these services and/or did not represent bona fide charges by third party service providers. Mortgage Capital failed to disclose the overcharges to Plaintiffs." (Doc. 23, ¶ 116). Plaintiffs further allege that "the unfair and deceptive acts and practices by Mortgage Capital were made with the intent that Plaintiffs rely on such representations. Plaintiffs so relied." (Doc. 23, ¶ 117). Therefore, the Court denies RFC's motion to dismiss the ICFA claims based on lack of particularity.

**E. Civil Conspiracy**

The Court determines that Plaintiffs have stated sufficient facts to support their Illinois civil conspiracy claim. First, a plaintiffs claim based on Illinois civil conspiracy must include facts tending to show an agreement among the defendants to commit a tortious or unlawful act. **McClure v. Owens Corning Fiberglas Corp., 188 Ill.2d 102, 133 (1999).** In this case, Plaintiffs have alleged that there was an agreement among the lender, its CEO and their law firm to defraud borrowers. Second, an Illinois civil conspiracy is not an independent tort, and failure to plead properly an independent cause of action on which the conspiracy is allegedly based requires dismissal of the conspiracy claim. **Indeck N. Amer. Power Fund v. Norweb, 316 m.App.3d 416, 432, 249 Ill.Dec. 45. 735 N.E.2d 649 (2000)(citing Adcock v. Brakegate. Ltd., 164 Il1.2d 54. 206 Ill.Dec. 636. 645 N.E.2d 888 (1994)).** In this case, Plaintiffs have alleged common law fraud and violations of the Illinois Consumer Fraud Act. Therefore, Plaintiffs have properly pleaded a claim based on Illinois civil conspiracy.

## IV. Conclusion

Accordingly, the Court **DENIES** RFC's motion to dismiss (Doc. 26).

**IT IS SO ORDERED.**

Signed this 25th day of May, 2004.

/s/ David R. Herndon
**DAVID R. HERNDON**
**United States District Judge**

**IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS**

| | | |
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| **EDWARD and PAMELA REISER et al.,** | ) | **CASE NO. 03-619-DRH** |
| | ) | |
| | ) | **CJRA TRACK D** |
| **Plaintiffs,** | ) | |
| | ) | **JUDGE: DAVID R.** |
| **vs.** | ) | **HERNDON** |
| | ) | |
| **RESIDENTIAL FUNDING CORPORATION,** | ) | |
| | ) | |
| | ) | |
| **Defendant.** | ) | |

**ORDER**

On May 25, 2004, this Court issued an order denying Defendant Residential Funding Corporation's ("RFC") motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6), and holding, *inter ailia*: (1) that Illinois Interest Act, 815 ILCS 205/4.1 a has not been impliedly repealed; and (2) that thePlaintiffs' allegations as to the actions of Mortgage Capital Resources, Johnson and Payne and other persons unrelated to RFC were sufficient to toll the statutes of limitations as to RFC. Because both of these issues are controlling legal questions about which there are substantial grounds for a difference of opinion, and because immediate interlocutory review

may materially advance the ultimate termination of this litigation, certification of the May 25, 2004 Order is appropriate under 28 U.S.C. § 1292(b).

Accordingly, IT IS HEREBY ORDERED that the May 25, 2004 Order is deemed amended to include the following: "Pursuant to 28 U.S.C. § 1292(b), this Court's May 25, 2004 Order denying Defendant's motion to dismiss presents controlling legal questions about which there is substantial grounds for difference of opinion and an immediate appeal from the Order may materially advance the ultimate termination of the litigation."

Dated: July 9, 2004

/s/ David R Herndon
United States District Judge

**IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS**

**KURT AND PATRICIA LANDMANN;
KEITH AND DIANA CALLENDER;
and KENNETH AND LISA MEADOWS,
individually and on behalf of all others similarly situated,**

**Plaintiffs,**

**vs.** **No. 01-CV-00417-DRH**

**BANN-COR, a California corporation, FIRSTPLUS HOME LOAN OWNER TRUST, 1997-1; FIRSTPLUS HOME LOAN OWNER TRUST, 1997-2; FIRSTPLUS HOME LOAN OWNER TRUST, 1997-3; FIRSTPLUS HOME LOAN OWNER TRUST, 1997-4; FIRSTPLUS HOME LOAN OWNER TRUST, 1998-1; FIRSTPLUS HOME LOAN OWNER TRUST, 1998-2; FIRSTPLUS HOME LOAN OWNER TRUST, 1998-3; FIRSTPLUS HOME LOAN OWNER TRUST, 1998-4; FIRSTPLUS HOME LOAN OWNER TRUST, 1998-5; EMPIRE FUNDING TRUST 1997-1; EMPIRE FUNDING TRUST 1997-2; EMPIRE FUNDING TRUST 1997-3; EMPIRE FUNDING TRUST 1997-4; EMPIRE FUNDING TRUST 1998.;1;EMPIRE FUNDING TRUST 1998-2; EMPIRE FUNDING TRUST 1998-3; EMPIRE FUNDING TRUST 1999-1; PSB LENDING HOME OWNER TRUST 1997-3; PSB LENDING HOME OWNER TRUST 1997-4; COUNTRYWIDE HOME LOAN TRUST 2001-HLV1; THE MONEY STORE RESIDENTIAL TRUST 1997-1; THE MONEY STORE RESIDENTIAL TRUST 1997-11; CITYSCAPE HOME LOAN OWNER TRUST 1997-2; CITYSCAPE HOME LOAN OWNER TRUST 1997-3; CITYSCAPE HOME .LOAN OWNER TRUST 1997-4; CITYSCAPE HOME EQUITY LOAN TRUST SERIES 1997-B; CITYSCAPE HOME EQUITY LOAN TRUST SERIES 1997-C; U.S. BANK, NA, ND; GMACRESIDENTIAL FUNDING CORPORATION, a Delaware corporation;**

**AMAXIMISLENDING, LLC, a Texas limited liability company; HOMEQ SERVICING CORPORATION, a New Jersey corporation, f/k/a TMS Mortgage, Incorporated; BANK ONE FINANCIAL SERVICES, INC., an Indiana corporation; CITYSCAPE CORPORATION, a New York corporation,**

**Defendants.**

## MEMORANDUM AND ORDER

**HERNDON, District Judge:**

### I. Introduction

This lawsuit arises from a May 2001 four-count complaint filed by Kurt and Patricia Landmann, Keith and Diana Callender, and Kenneth and Lisa Meadows (the "Named Plaintiffs"), on behalf of a putative class[1] in Madison County, Illinois, alleging that second mortgage loans made by Bann-Cor and allegedly purchased by 27 trusts (also named as Defendants) violated the Illinois Interest Act, **815 ILCS 205/4.1, et seq.**, and the Illinois Consumer and Deceptive Practices Act, **815 ILCS 505/1, et seq**. (Doc. 2). On June 25, 2001, a group of Defendants (with the consent of the other Defendants) removed the case to federal court based on federal diversity

[1] Plaintiffs seek certification of a class defined as "all persons who were sold second mortgage loans by Defendant Bann-Cor, which were secured by residential real estate in the State of Illinois and had an interest rate in excess of 8% per annum and origination fees charged that exceed 3% of the principal amount of the loan." (Doc. 97, ¶ 2).

jurisdiction, **28 U.S.C. § 1332** (Doc. 1). By Memorandum and Order dated February 10', 2003, this Court dismissed Plaintiffs' complaint without prejudice finding that while Plaintiffs had not satisfied the formal standing requirements with respect to the trust Defendants, Plaintiffs might be able to frame their allegations in such a way as to satisfy this requirement by using the juridical link doctrine articulated by the Seventh Circuit in **Payton v. County of Kane, 308 F.3d 673 (7th Cir. 2002)** (Doc. 96).

On February 28, 2003, Plaintiffs filed a first amended complaint ("amended complaint") (Doc. 97). The amended complaint asserts claims only under the Illinois Interest Act, **815 ILCS 205/4.1, et seq.**, specifically **815 ILCS 205/4.1a(f)**, against Bann-Cor (Count I) and entities Plaintiffs describe as the "Assignee Defendants" [2] (Count II).[3] At the present time, there are five motions

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[2] Plaintiffs define Assignee Defendants as those who are current or former holders of notes related to second mortgage loans sold by Bann-Cor to Plaintiffs and class members (Doc. 97, ¶ 44). In other words, Plaintiffs define Assignee Defendants in such a way to include as Defendants those who were not alleged to have originated or held the Named Plaintiffs' loans, but rather were alleged to have purchased loans issued by the Bann-Cor to borrowers other than the Named Plaintiffs.

[3] The amended complaint names six more of these entities Plaintiffs describe as Assignee Defendants, including U.S. Bank. N.A., ND; GMAC-Residential Funding Corporation; Amaximis Lending LLC; Homeq Servicing Corporation; Bank One Financial Services. Inc.; and Cityscape Corporation.

to dismiss filed by the 34 Defendants currently involved in this case (Docs. 104, 106. 108, 110, & 118).

After reviewing all the parties' papers, the Court believes two fundamental issues standout and deserve priority consideration. First, have Plaintiffs satisfied the standing requirement by way of the juridical link doctrine? Because the Court finds that they have not, the Court dismisses all Defendants except Bann-Cor and Firstplus Home Loan Owner Trust 1997-1 from the lawsuit and orders Plaintiffs to file an amended complaint that reflects the dismissal of these Defendants. Second, are Plaintiffs entitled to seek relief pursuant to § 4.1a(f) of the Illinois Interest Act or has it been repealed? Because the Court finds they are entitled to seek such relief, Plaintiffs may proceed with their suit against the remaining Defendants.

## II. Background

Plaintiffs are three married couples who reside in Illinois (Doc. 97, ¶¶ 7- 9). Each couple obtained a second mortgage on their homes from Bann-Cor, a financial lender (Doc. 97, ¶ 45). Each of these second mortgages had an interest rate of 13.99% and charged

various items as "costs" and "fees", including origination fees, processing fees, settlement fees. and finder's fees, coupled with non bona fide closing costs (Doc. 97, ¶¶ 91,92,95,99, 104). Plaintiffs describe these loans as "High Loan to Value" loans ("HLTV loans") because they are secured by a second mortgage on residential property where the total outstanding debt on the dwelling often exceeds the fair market value of the property (Doc. 97, ¶ 47).

Each note and mortgage secured by Plaintiffs included provisions that the rights and duties of Bann-Cor were assignable, that all rights and duties would be binding on and inure to the benefit of the assignee, and that the laws of the state of Illinois would govern the mortgages (Doc. 97, ¶¶ 52, 83). Plaintiffs explain that Bann-Cor did not maintain its own loan portfolio; rather, to make the loans attractive to the secondary market for sub-prime loans, it pooled and sold the loans to investors either through bulk loan sales or by securitizing the loans into Real Estate Investment Trusts (Doc. 97, ¶ 53). Plaintiffs allege these purchasers (the Assignee Defendants) are also liable to the class under the Illinois Interest Act by way of the Home Ownership and Equity Protection Act, **15 U.S.C. § 1641(d)**.

With regard to the Named Plaintiffs, the amended complaint alleges that on January 9, 1997, the Landmanns obtained a 20-year second mortgage home equity loan from Bann-Cor in the principal amount of $29,000.00 and that loan was assigned to Defendant Cityscape Corporation and is now held by one of the Cityscape Trusts (Doc. 97, ¶¶ 94, 97). The amended complaint further alleges that on January 20, 1997, the Meadows secured a similar 20-year home loan from Bann-Cor in the principal amount of $23,000.00 that was originally assigned to Firstplus Financial, Inc. and then assigned to First Trust of California, NA (nka US Bank, NA ND) as trustee for Defendant Firstplus Home Loan Owner Trust 1997-1 (Doc. 97, ¶¶ 98, 101). Finally, the amended complaint alleges that on December 26, 1996, the Callenders obtained a 15-year second mortgage home equity loan from Bann-Cor in the principal amount of $35,000.00 that was assigned to Firstplus Financial and is now held by one of the Firstplus Trust Defendants (Doc. 97, ¶ ¶ 102, 106)

On December 11, 2003, the Court stayed the case pending the resolution of the parties' appeal to the Seventh Circuit regarding the Honorable Michael J. Reagan's dismissal of similar claims under the Illinois Interest Act. **See Mickey Krone, et al., v. 125 Home Loan**

**Owner Trust, et al., 01-CV-691-MJR (S.D. Ill. Aug. 27, 2003)(holding that Section 4.1a(f) of the Illinois Interest Act was repealed by a later amendment to that statute)** (Doc. 138). The parties settled that case before the appeal was resolved, so it is now incumbent upon this Court to resolve this-matter.

## III. Analysis

### A. Motion to Dismiss Standard

Defendants bring their motions pursuant to **FEDERAL RULES OF CIVIL PROCEDURE 12(b)(l)** and **12(b)(6)**. When considering a motion to dismiss for lack of subject matter jurisdiction under **RULE 12(b)(1)** and a motion to dismiss for failure

to state a claim under **RULE 12(b)(6)**, the Court must accept all factual allegations in the complaint as true and draw all reasonable inferences in favor of plaintiff. **See Transit Exp., Inc. v. Ettinger, 246 F.3d 1018, 1023 (7th Cir. 2001)(applying this standard to a Rule 12(b)(1) motion); Szumny v. Am. Gen. Fin., 246 F.3d 1065, 1067 (7thCir. 2001)(applying this standard to a Rule 12(b)(6) motion)**. The purpose of a motion to dismiss is not to decide the merits of the challenged claims but to test the sufficiency of the complaint. **Weiler v. Household Fin. Corp., 101 F.3d 519, 524 n.l**

**(7th Cir. 1996).** A court will grant a motion to dismiss only if it is impossible for the plaintiff to prevail under any set of facts that could be proven consistent with the allegations. **Forseth v. Village oj Sussex, 199 F.3d 363, 368 (7th Cir. 2000).**

**B. Article III Standing and the Juridical Link Doctrine**

As stated above and incorporated herein, the Court's February 10, 2003 Order found that while Plaintiffs had not satisfied the normal standing requirements with respect to the Assignee Defendants, Plaintiffs might be able to frame their allegations in such a way as to satisfy this requirement by using the juridical link doctrine articulated by the Seventh Circuit in **Payton v. County oj Kane, 308 F.3d 673 (7th Cir. 2002).**

As explained by the Seventh Circuit in **Payton**, the juridical link doctrine is a judicial construct which developed largely from a Ninth Circuit decision, **La Mar v. H & B Novelty & Loan Co., 489 F.2d 461 (7th Cir. 1973)**. The Seventh Circuit explained:

> *La Mar* held that a plaintiff without a cause of action against a specific defendant cannot 'fairly and adequately' protect the interests of those who do not have such causes of action for purposes of Rule 23(a). Nevertheless, . . . the court went on to hold that if the plaintiffs as a group- named and unnamed - have suffered an identical injury at the hands of

> several parties related by way of a conspiracy or concerted scheme, or otherwise 'juridically related in a manner that suggests a single resolution of the dispute would be expeditious,' the claim could go forward.

**Payton**. **308 F.3d at 678-79**. Post-**La Mar** cases have applied the juridical link doctrine in limited factual circumstances, specifically where "all the defendants took part in a similar scheme that was sustained either by a contract or conspiracy, or was mandated by a uniform state rule." **Id. at 679.**

In **Payton**, the Seventh Circuit applied the juridical link doctrine to a putative class action where arrestees brought an action against 19 different Illinois county sheriffs challenging the bail bond fee imposed pursuant to state statute. **Id. at 675**. The Seventh Circuit reasoned that "given the bail bond fee is imposed pursuant to a state statute, and that county sheriffs are for this purpose an arm of the state, . . . it is reasonable for the putative plaintiff class to try to hold all counties accountable within one suit." **Id. at 680.** The Seventh Circuit further reasoned that "the constitutionality of a bond fee (whether it is $1 or $45) should not differ from one county to the next, when such a fee is imposed pursuant to the same statute." **Id.**

In this case, the Named Plaintiffs attempt to create this link by alleging that the Assignee Defendants "ha[ve] contracted with BANN-COR or BANN-COR's assignee to take assignment of the loans" and "have taken part in a similar scheme of loan pooling and securitization as described above." (Doc. 97, ¶¶ 85, 86). Put simply, the Named Plaintiffs allege they have standing to assert their claims against all Defendants because all of the Assignee Defendants are linked to the Plaintiffs through a common juridical lynchpin, that is through Bann-Cor. As in their original complaint, Plaintiffs have failed to identify the Assignee Defendants with three noted exceptions: (1) Plaintiffs allege that the Meadow loan is currently held by Defendant Firstplus Home Loan Owner Trust 1997-1 (Doc. 97, ¶ 101); (2) Plaintiffs allege that the Landmann loan was originally assigned to Defendant Cityscape Corporation and is now held by one of the Cityscape Trust Defendants (Doc. 97, 1197); and (3) Plaintiffs allege that the Callender loan is currently held by one of the Firstplus Trust Defendants (Doc. 97, ¶ 106).

Leaving this group aside, the Court finds that Named Plaintiffs do not allege any of the factual circumstances that would warrant application of the juridical link doctrine against the

remaining Assignee Defendants. Specifically, the Named Plaintiffs fail to allege any state or local statute requiring common action by the Assignee Defendants, nor are the Assignee Defendants alleged to be government actors. Rather, these Defendants are competitors in the same business, further undercutting any argument they acted in concert with each other. Indeed, in a recent decision, **Funliner of Alabama, L.L.C. v. Pickard, 2003 WL 21205391 (Ala. May 23, 2003)**, the Alabama Supreme Court rejected the trial court's certification of a defendant class based on the juridical link doctrine finding substantial due process concerns raised by the fact that each named plaintiff did not have a cause of action against each member of the defendant class:

> [T]he trial court attempted to rely upon the fact that each plaintiff and each defendant interacted in essentially the same manner and, therefore, the claims of the plaintiff class could relate to the defendant class as a whole...the defendants sought to be named as a class in this action are not state officials charged with enforcing, or acting uniformly in accordance, with a state statute. They are simply business entities and individuals located throughout this state that have engaged in the business of operating or leasing video-gaming machines. The fact that the defendants engage in similar or related business is insufficient to overcome the due-process concerns raised by plaintiffs' attempt to certify a defendant class.

**Funliner, 2003WL 21205391, at *16-17.**

In an effort to fall within the narrow juridical link exception, the Named Plaintiffs urge the Court to consider two cases, **Moore v. Comfed Savings Bank, 908 F.2d 834 (11th Cir. 1990)** and **Weld v. Glaxo Wellcome Inc., 746 N.E.2d 522 (Mass. 2001)**, discussed in **Payton**. Both these cases are procedurally distinguishable, and conflict with the overwhelming authority rejecting the juridical link exception in this context. **See, e.g., Krone v. First Nat'l Mortage Exch., No. OFCV-0691 (S.D. Ill. June 3, 2002) (Reagan, J.); Dunden v. Firstplus Bank, No. 01-408-GPM (S.D. Ill. Apr. 29, 2002) (Murphy, C.J.); Faircloth v. Nat'l Home Loan Corp., 2003 WL 1232825, at *4 (M.D.N.C. Mar. 17, 2003)(Beaty, J.); Dash v. Firstplus Home Loan Trust 1996-2, 248 F.Supp.2d 489, 505 (M.D.N.C. Mar. 6, 2003)(Beaty, J.); Alexander v. PSB Lending Corp., 800 N.E.2d 984, 994 (Ind. App. Dec. 31, 2003).**

Similarly, the Court is unmoved by the Named Plaintiffs' argument that it must consider all the putative class members when determining the standing requirements. In this regard, Judge Easterbrook's opinion in **Jackson v. Resolution GGF OY, 136 F.3d 1130 (7th Cir. 1998)**, is instructive. In **Jackson**, a group of

borrowers filed a complaint on behalf of a putative class alleging that lenders had charged points in excess of those permitted under the Illinois Interest Act. In affirming the district court's grant of summary judgment, Judge Easterbrook explained:

> [T]here is a question what Norwest Financial Illinois, Inc., one of the defendants, is doing in any court. Norwest bought some of Harbor's paper but does not hold the notes signed by any of the plaintiffs, and it asked the court to dismiss it from the case on the ground that none of the plaintiffs had standing to pursue a claim against it. The district judge did not act on this motion. Like any other jurisdictional issue, this subject should have received priority consideration. Norwest's position is impeccable. Some other borrowers may have claims against it, but none of these plaintiffs does - and as the case was not certified as a class action, the only claims before the court are those of the plaintiffs personally. We need not decide whether Norwest would have been a proper defendant had the class been certified even though none of the representative plaintiffs held a legal claim against it. There is no case or controversy between Norwest and any of the named plaintiffs, so Norwest must be dismissed as a party. **Warth v. Seldin, 422 U.S. 490, 502 (1975).**

**Id. at 1132**. It is true, as Plaintiffs point out, the **Payton** court cites the United States Supreme Court's language in **Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999)** with approval: "[T]he class certification issues are. . . 'logically antecedent' to Article III concerns, and themselves pertain to statutory standing, which may properly be

treated before Article III standing. Thus the issues about Rule 23 should be treated first." **Id. at 831**. However, this quoted language is proceeded by the general rule that the court must first assure itself of its own jurisdiction: "[O]rdinarily, of course, this or any other Article III court must be sure of its own jurisdiction before getting to the merits." **Oritz, 527 U.S. at 831.**

It is also important to take into consideration the unique procedural posture of **Ortiz**, which addressed the settlement of potential future claims for asbestos related injuries that had not manifested themselves at the time the action was fIled or even settled. The issue in **Oritz** was whether' a case or controversy existed without an injury in fact. Without specifically resolving the Article III issue, the Supreme Court held that the trial court's certification of a mandatory class under **RULE 23(b)(I)(B)** on a limited fund rationale was improper and rejected the settlement on that basis. By contrast, as in this case, the issue in Jackson was whether the named plaintiffs, who had concrete claims against certain defendants, had standing to assert claims against another defendant with whom they had no direct dealings. This Court is compelled to follow **Jackson**.

Further, the Court sees no reason why simply framing a lawsuit as a class action removes the Named Plaintiffs' burden to demonstrate standing: "[E]ven named plaintiffs who represent a class 'must allege and show that they personally have been injured, not that injury has been suffered by other unidentified members of the class to which they belong and purport to represent.'" **Simon v. E. Kentucky Welfare Rights Org., 426 U.S. 26, 40 n.20 (1976)(quoting Warth v. Seldin, 422 U.S. 490, 518 (1975))**. More importantly, the Court must note that the "class" has not been certified and the complaint is merely a "proposed" class actions. Thus, the Court rejects the Named Plaintiffs' argument that standing must be properly determined on a classwide basis against the Assignee Defendants.

In sum, the Court **DISMISSES** all Defendants, except for Bann-Cor and Firstplus Home Loan Owner Trust 1997-1, because the Named Plaintiffs have not demonstrated standing. As to the FirstPlus Trusts and the Cityscape Trusts, if the Named Plaintiffs can specifically allege that a particular trust holds their loan, they may amend their complaint to so state.

**C. Illinois Interest Act**

By their amended complaint, the Named Plaintiffs rest their claims solely on § 4.1a(f) of the Illinois Interest Act. That Section addresses "Charges for items paid or incurred in connection with loans," and provides in relevant part:

> Where there is a charge in addition to the stated rate of interest payable directly or indirectly by the borrower and imposed directly or indirectly by the lender as a consideration for the loan, . . .whether denominated 'points,' 'service charge,' 'discount,' 'commission,' or otherwise. . . . the rate of interest shall be calculated in the following manner:
>
> The percentage of the principal amount of the loan represented by all of such charges shall first be computed, which' in the case of a loan with an interest rate in excess of 8% annum secured by residential real estate, other than loans described in paragraphs (e) and (f) of Section 4, shall not exceed 3% of such principal amount.

**815 ILCS § 205/4.1a(f).** Relying on the Seventh Circuit's decision in **Currie v. Diamond Mortgage Corp. of Ill., 859 F.2d 1538,1542-43 (7th Cir. 1988)**, and Judge Reagan's unpublished decision in **Krone v. First National Mortgage Exchange, et al., No. 01-CV-691-MJR (S.D. Ill. Aug. 27, 2003).** Defendants argue § 4.1a(f) was implicitly repealed by the Illinois legislature's enactment of an amendment to Section 4 in 1981.

The 1981 amendment to Section 4 of the Illinois Interest Act provided, in pertinent part, that it is "lawful to charge, contract for, and receive any rate or amount of interest or compensation with respect to certain specified transactions," including "loans secured by mortgage on real estate." **815 ILCS § 205/4(1)(*l*)**. Interpreting these provisions seven years after the amendment, the Seventh Circuit in Currie stated that while "[c]ourts strongly disfavor repeal by implication and will invoke this doctrine of statutory construction only where a statute enacted later in time is repugnant to an earlier statute such that the two acts cannot stand together," they held the 1981 amendment implicitly repealed § 4.1a(f). Following **Currie**, however, an Illinois Appellate Court expressly rejected the Seventh Circuit's analysis describing it as dicta and holding that § 4.1a was not repealed by implication. **Fidelity Financial Services. Inc. v. Hicks, 574 N.E.2d 15, 19 (fiI. App. 1991), appeal denied by, Fidelity Financial Services, Inc. v. Hicks, 580 N.E.2d 112 (Ill. 1991).**

This disconnect in the interpretation of § 4.1 a between the decision of the Seventh Circuit in **Currie** and the decision of the Illinois Appellate Court in **Fidelity Financial Services** lead to the issue in **Jackson** As Judge Easterbrook explained:

> Between 1989 and 1991 Harbor charged more than 3 points in Illinois for loans secured by junior mortgages on real estate believing that 815 ILCS 205j4.1a, which limits a lender to 3 points if it charges interest at an annual rate exceeding 8%, had been repealed by an amendment to a related section of that same statute, the Illinois Interest Act. So Currie v. Diamond Mortgage Corp., 859 F.2d 1538 (7th Cir. 1988), holds, and it was Currie that emboldened Harbor to charge more than 3 points until Fidelity Financial Services, Inc. v. Hicks, 214 Ill. App.3d 398, 158 Ill.Dec. 221, 574 N.E.2d 15 (1 st. Dist. 1991), held that Currie' misunderstood state law and the point limitation remains in force.

**Id. at 1131**. In **Jackson**, Judge Easterbrook framed the issue as "whether charging more than 3 points on loans made after the Legal Counsel's letter [suggesting *Currie* was a correct interpretation of the law], and before *Fidelity Financial Services*, was 'in conformity with any rule, regulation, interpretation, or opinion issued by . . . the Department of Financial Institutions.'" **Id. at 1133.** The Court believes implicit in the **Jackson** decision is the recognition that **Fidelity** overruled **Currie.**

That said, because this is a diversity case, the Court must apply Illinois law as it believes the Illinois Supreme Court would apply it. **See Liberty Mutual Fire Ins. Co. v. Statewide Ins. Co., 352 F.3d 1098, 1100 (7th Cir. 2003).** While the highest court in Illinois has not spoken on this issue, an Illinois appellate court has. In that circumstance, the Court must estimate how the Illinois Supreme Court would rule by according great weight to holdings of the state's intermediate appellate courts. **See id. (citing Commonwealth Ins. Co. v. Stone Container Corp., 323 F.3d 507 (7th Cir. 2003); Brunswick Leasing Corp. v. Wis. Cent. Ltd., 136 F.3d 521 (7th Cir. 1998)).** Indeed, it is a well-established rule of law that a federal court "ought to deviate from those holdings [of the intermediate appellate court] only where there are persuasive indications that the highest court of the state would decide the case differently from the decision of the intermediate appellate court." **Woidtke v. St. Clair County, Illinois, 335 F.3d 558, 562 (7th Cir. 2003)(quoting Allstate Ins. Co. v. Menards, Inc., 285 F.3d 630, 637 (7th Cir. 2002)).**

The Court finds Judge Coar's reasoning, the district judge in **Jackson**, highly relevant to this inquiry. In considering this issue,

Judge Coar first found that the plaintiffs' argument that the Illinois Supreme Court declined to take the appeal of **Hicks** unpersuasive. He found the plaintiffs' second argument, however, much more compelling:

> In this case, the Illinois General Assembly passed amendments to both sections 4 and 4.l(a) of the Interest Act on June 26, 1991, after the Seventh Circuit's 1989 ruling in Currie and the First District's April 8, 1991, ruling in *Hicks*. *See* Pub. Act 87-495 and 87-496, reprinted in 2 Laws of Ill., 87th Gen. Assembly, 1991 Sess. (1991). The General Assembly, which is presumed to have been aware of the contradictory results of these two cases, did not change, amend or repeal the relevant language either of section 4.l(a), which limits the amount of recoverable charges to three percent of the principal or of subsection 4(1)(*l*), which permits a lender to charge any rate or amount of interest of compensation for 'loans secured by mortgage on real estate.' Had the legislature agreed with the Seventh's Circuit conclusion in *Currie*, it should have formally amended or repealed either of these relevant statutory provisions to conform to its intended result. The legislature's decision not to amend either of these provisions is compelling evidence that it agreed with and adopted the First District's conclusion in *Hicks* (i.e., that the 1981 amendment to section 4 did not implicitly repeal section 4.1 a and that these two statutory provisions can be construed in harmony.)

**Jackson v. Resolution GGF OY, 1995 WL 562120, *6 (N.D. Ill. Sept. 20, 1995) (Coar, J.)**. The Court agrees with Judge Coar's conclusion that "although. . . the reasoning of *Currie* is

persuasive. . . the Illinois Supreme Court would most likely adopt the results in the *Hicks* decision based upon the legislature's 1991 amendments to sections 4 and 4.1a and the principle that repeal by implication is strongly disfavored." **Id.** Thus, the Court finds that the Named Plaintiffs may pursue their § 4.1a(f) claim against the remaining Defendants.

## IV. Conclusion

In conclusion, the Court **GRANTS in part** the Assignee Defendants' motions to dismiss (Doc. 104, 108, 110, & 118) and **DENIES** Bann-Cor's motion to dismiss (Doc. 106). The Court **DISMISSES** the following Defendants from this suit without prejudice: EMPIRE FUNDING TRUST 1997-1; EMPIRE FUNDING TRUST I997-2; EMPIRE FUNDING TRUST 1997-3; EMPIRE FUNDING TRUST 1997- 4; EMPIRE FUNDING TRUST 1998-1 ; EMPIRE FUNDING TRUST 1998-2; EMPIRE FUNDING TRUST 1998-3; EMPIRE FUNDING TRUST 1999-1; PSB LENDING HOME OWNER TRUST 1997-3; PSB LENDING HOME OWNER TRUST 1997- 4;COUNTRYWIDE HOME LOAN TRUST 2001-HLV1; THE MONEY STORE RESIDENTIAL TRUST 1997-1; THE MONEY STORE RESIDENTIAL TRUST

1997-II; U.S. BANK. NA, ND; GMAC-RESIDENTIAL FUNDING CORPORATION; AMAXIMIS LENDING. LLC; HOMEQ SERVICING CORPORATION; BANK ONE FINANCIAL SERVICES. INC.; FIRSTPLUS HOME LOAN OWNER TRUST. 1997-2; FIRSTPLUS HOME LOAN OWNER TRUST. 1997-3; FIRSTPLUS HOME LOAN OWNER TRUST. 1997-4; FIRSTPLUS HOME LOAN OWNER TRUST. 1998-1; FIRSTPLUS HOME LOAN OWNER TRUST, 1998-2; FIRSTPLUS HOME LOAN OWNER TRUST, 1998-3; FIRSTPLUS HOMELOAN OWNER TRUST. 1998-4; FIRSTPLUS HOME LOAN OWNER TRUST. 1998-5; CITYSCAPE HOME LOAN OWNER TRUST 1997-2; CITYSCAPE HOME LOAN OWNER TRUST 1997-3; CITYSCAPE HOME LOAN OWNER TRUST 1997-4; CITYSCAPE HOME EQUITY LOAN TRUST SERIES 1997-B; CITYSCAPE HOME EQUITY LOAN TRUST SERIES 1997-C; CITYSCAPE CORPORATION.

Defendants remaining in the action are Bann-Cor and Firstplus Home Loan Owner Trust 1997-1. Plaintiffs are **DIRECTED** to file a second amended complaint consistent with this Order within (30) thirty days of its entry. As to the FirstPlus Trusts

and the Cityscape Trusts, the Named Plaintiffs may use this opportunity to file a complaint that specifically alleges that a particular trust holds their loan. All other challenges to the sufficiency of this complaint are moot.

**IT IS SO ORDERED.**
Signed this 26th day of February, 2004.

/s/ David R. Herndon
**DAVID R. HERNDON**
**United States District Judge**

**205/4.1a. Charges for items paid or incurred in connection with loans**

§ 4.1a. Charges for and cost of the following items paid or incurred by any lender in connection with any loan shall not be deemed to be charges for or in connection with any loan of money referred to in Section 6 of this Act, or charges by the lender as a consideration for the loan referred to in this Section:

(a) hazard, mortgage or life insurance premiums, survey, credit report, title insurance, abstract and attorneys' fees, recording charges, escrow and appraisal fees, and similar charges.

(b) in the case of construction loans, in addition to the matters referred to in clause (a) above, the actual cost incurred by the lender for services for making physical inspections, processing payouts, examining and reviewing contractors' and subcontractors' sworn statements and waivers of lien and the like.

(c) in the case of any loan made pursuant to the provisions of the Emergency Home Purchase Assistance Act of 1974 (Section 313 of the National Housing Act, Chapter B of Title 12 of the United States Code), [FN1] in addition to the matters referred to in paragraphs (a) and (b) of this Section, all charges required or allowed by the Government National Mortgage Association, whether designated as processing fees, commitment fees, loss reserve and marketing fees, discounts, origination fees or otherwise designated.

(d) in the case of a single payment loan, made for a period of 6 months or less, a regulated financial institution or licensed lender may contract for and receive a maximum charge of $15 in lieu of interest. Such charge may be collected when the loan is made, but only one such charge may be contracted for, received, or collected for any such loan, including any extension or renewal thereof.

(e) if the agreement governing the loan so provides, a charge not to exceed the rate permitted under Section 3-806 of the Uniform

Commercial Code [FN2]-Commercial Paper for any check, draft or order for the payment of money submitted in accordance with said agreement which is unpaid or not honored by a bank or other depository institution.

(f) if the agreement governing the loan so provides, for each loan installment in default for a period of not less than 10 days, a charge in an amount not in excess of 5% of such loan installment. Only one delinquency charge may be collected on any such loan installment regardless of the period during which it remains in default. Payments timely received by the lender under a written extension or deferral agreement shall not be subject to any delinquency charge.

Where there is a charge in addition to the stated rate of interest payable directly or indirectly by the borrower and imposed directly or indirectly by the lender as a consideration for the loan, or for or in connection with the loan of money, whether paid or payable by the borrower, the seller, or any other person on behalf of the borrower to the lender or to a third party, or for or in connection with the loan of money, other than as hereinabove in this Section provided, whether denominated "points," "service charge," "discount," "commission," or otherwise, and without regard to declining balances of principal which would result from any required or optional amortization of the principal of the loan, the rate of interest shall be calculated in the following manner:

The percentage of the principal amount of the loan represented by all of such charges shall first be computed, which in the case of a loan with an interest rate in excess of 8% per annum secured by residential real estate, other than loans described in paragraphs (e) and (f) of Section 4, shall not exceed 3% of such principal amount. Said percentage shall then be divided by the number of years and fractions thereof of the period of the loan according to its stated maturity. The percentage thus obtained shall then be added to the percentage of the stated annual rate of interest.

The borrower in the case of a nonexempt loan shall have the right to prepay the loan in whole or in part at any time, but, except as may otherwise be provided by Section 4, the lender may require payment of not more than 6 months' advance interest on that part of the

aggregate amount of all prepayments on a loan in one year, which exceeds 20% of the original principal amount of the loan.

§ 4. General interest rate.

(1) In all written contracts it shall be lawful for the parties to stipulate or agree that 9% per annum, or any less sum of interest, shall be taken and paid upon every $100 of money loaned or in any manner due and owing from any person to any other person or corporation in this state, and after that rate for a greater or less sum, or for a longer or shorter time, except as herein provided.

The maximum rate of interest that may lawfully be contracted for is determined by the law applicable thereto at the time the contract is made. Any provision in any contract, whether made before or after July 1, 1969, which provides for or purports to authorize, contingent upon a change in the Illinois law after the contract is made, any rate of interest greater than the maximum lawful rate at the time the contract is made, is void.

It is lawful for a state bank or a branch of an out-of-state bank, as those terms are defined in Section 2 of the Illinois Banking Act, [FN1] to receive or to contract to receive and collect interest and charges at any rate or rates agreed upon by the bank or branch and the borrower. It is lawful for a savings bank chartered under the Savings Bank Act [FN2] or a savings association chartered under the Illinois Savings and Loan Act of 1985 [FN3] to receive or contract to receive and collect interest and charges at any rate agreed upon by the savings bank or savings association and the borrower.

It is lawful to receive or to contract to receive and collect interest and charges as authorized by this Act and as authorized by the Consumer Installment Loan Act [FN4] and by the "Consumer Finance Act", approved July 10, 1935, as now or hereafter amended. [FN5] It is lawful to charge, contract for, and receive any rate or amount of interest or compensation with respect to the following transactions:

(a) Any loan made to a corporation;
(b) Advances of money, repayable on demand, to an amount not less than $5,000, which are made upon warehouse receipts, bills of lading, certificates of stock, certificates of deposit, bills of exchange, bonds or other negotiable instruments pledged as collateral security for such repayment, if evidenced by a writing;
(c) Any credit transaction between a merchandise wholesaler and retailer; any business loan to a business association or copartnership or to a person owning and operating a business as sole proprietor or to any persons owning and operating a business as joint venturers, joint tenants or tenants in common, or to any limited partnership, or to any trustee owning and operating a business or whose beneficiaries own and operate a business, except that any loan which is secured (1) by an assignment of an individual obligor's salary, wages, commissions or other compensation for services, or (2) by his household furniture or other goods used for his personal, family or household purposes shall be deemed not to be a loan within the meaning of this subsection; and provided further that a loan which otherwise qualifies as a business loan within the meaning of this subsection shall not be deemed as not so qualifying because of the inclusion, with other security consisting of business assets of any such obligor, of real estate occupied by an individual obligor solely as his residence. The term "business" shall be deemed to mean a commercial, agricultural or industrial enterprise which is carried on for the purpose of investment or profit, but shall not be deemed to mean the ownership or maintenance of real estate occupied by an individual obligor solely as his residence;
(d) Any loan made in accordance with the provisions of Subchapter I of Chapter 13 of Title 12 of the United States Code, [FN6] which is designated as "Housing Renovation and Modernization";
(e) Any mortgage loan insured or upon which a commitment to insure has been issued under the provisions of the National Housing Act, Chapter 13 of Title 12 of the United States Code; [FN7]
(f) Any mortgage loan guaranteed or upon which a commitment to guaranty has been issued under the provisions of the Veterans' Benefits Act, Subchapter II of Chapter 37 of Title 38 of the United States Code; [FN8]
(g) Interest charged by a broker or dealer registered under the Securities Exchange Act of 1934, as amended, [FN9] or registered under the Illinois Securities Law of 1953, approved July 13, 1953, as

now or hereafter amended, [FN10] on a debit balance in an account for a customer if such debit balance is payable at will without penalty and is secured by securities as defined in Uniform Commercial Code-Investment Securities; [FN11]

(h) Any loan made by a participating bank as part of any loan guarantee program which provides for loans and for the refinancing of such loans to medical students, interns and residents and which are guaranteed by the American Medical Association Education and Research Foundation;

(i) Any loan made, guaranteed, or insured in accordance with the provisions of the Housing Act of 1949, Subchapter III of Chapter 8A of Title 42 of the United States Code [FN12] and the Consolidated Farm and Rural Development Act, Subchapters I, II, and III of Chapter 50 of Title 7 of the United States Code; [FN13]

(j) Any loan by an employee pension benefit plan, as defined in Section 3 (2) of the Employee Retirement Income Security Act of 1974 (29 U.S.C.A. Sec. 1002), to an individual participating in such plan, provided that such loan satisfies the prohibited transaction exemption requirements of Section 408 (b) (1) (29 U.S.C.A. Sec. 1108 (b) (1)) or Section 2003 (a) (26 U.S.C.A. Sec. 4975 (d) (1)) of the Employee Retirement Income Security Act of 1974;

(k) Written contracts, agreements or bonds for deed providing for installment purchase of real estate;

(l) Loans secured by a mortgage on real estate;

(m) Loans made by a sole proprietorship, partnership, or corporation to an employee or to a person who has been offered employment by such sole proprietorship, partnership, or corporation made for the sole purpose of transferring an employee or person who has been offered employment to another office maintained and operated by the same sole proprietorship, partnership, or corporation;

(n) Loans to or for the benefit of students made by an institution of higher education.

(2) Except for loans described in subparagraph (a), (c), (d), (e), (f) or (i) of subsection (1) of this Section, and except to the extent permitted by the applicable statute for loans made pursuant to Section 4a or pursuant to the Consumer Installment Loan Act: [FN14]

(a) Whenever the rate of interest exceeds 8% per annum on any written contract, agreement or bond for deed providing for the installment purchase of residential real estate, or on any loan secured by a mortgage on residential real estate, it shall be unlawful to provide for a prepayment penalty or other charge for prepayment.
(b) No agreement, note or other instrument evidencing a loan secured by a mortgage on residential real estate, or written contract, agreement or bond for deed providing for the installment purchase of residential real estate, may provide for any change in the contract rate of interest during the term thereof. However, if the Congress of the United States or any federal agency authorizes any class of lender to enter, within limitations, into mortgage contracts or written contracts, agreements or bonds for deed in which the rate of interest may be changed during the term of the contract, any person, firm, corporation or other entity not otherwise prohibited from entering into mortgage contracts or written contracts, agreements or bonds for deed in Illinois may enter into mortgage contracts or written contracts, agreements or bonds for deed in which the rate of interest may be changed during the term of the contract, within the same limitations.

(3) In any contract or loan which is secured by a mortgage, deed of trust, or conveyance in the nature of a mortgage, on residential real estate, the interest which is computed, calculated, charged, or collected pursuant to such contract or loan, or pursuant to any regulation or rule promulgated pursuant to this Act, may not be computed, calculated, charged or collected for any period of time occurring after the date on which the total indebtedness, with the exception of late payment penalties, is paid in full.

For purposes of this Section, a prepayment shall mean the payment of the total indebtedness, with the exception of late payment penalties if incurred or charged, on any date before the date specified in the contract or loan agreement on which the total indebtedness shall be paid in full, or before the date on which all payments, if timely made, shall have been made. In the event of a prepayment of the indebtedness which is made on a date after the date on which interest on the indebtedness was last computed, calculated, charged, or collected but before the next date on which interest on the

indebtedness was to be calculated, computed, charged, or collected, the lender may calculate, charge and collect interest on the indebtedness for the period which elapsed between the date on which the prepayment is made and the date on which interest on the indebtedness was last computed, calculated, charged or collected at a rate equal to 1/360 of the annual rate for each day which so elapsed, which rate shall be applied to the indebtedness outstanding as of the date of prepayment. The lender shall refund to the borrower any interest charged or collected which exceeds that which the lender may charge or collect pursuant to the preceding sentence. The provisions of this amendatory Act of 1985 shall apply only to contracts or loans entered into on or after the effective date of this amendatory Act, but shall not apply to contracts or loans entered into on or after that date that are subject to Section 4a of this Act, the Consumer Installment Loan Act, or the Retail Installment Sales Act, [FN15] or that provide for the refund of precomputed interest on prepayment in the manner provided by such Act.

(1)

Supreme Court, U.S.
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# In the Supreme Court of the United States

EDWARD and PAMELA REISER and
JANET GREENLEE,

*Petitioners,*

*v.*

RESIDENTIAL FUNDING CORPORATION
a/k/a GMAC-RFC,

*Respondent.*

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Seventh Circuit

## BRIEF FOR RESPONDENT RESIDENTIAL FUNDING CORPORATION IN OPPOSITION

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## COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether a federal court of appeals in properly resolving a state law statutory construction issue may, in the absence of a controlling decision from a state supreme court construing a statute, refuse to be bound by one intermediate state court's construction of that statute.

## LIST OF PARTIES AND RULE 29.6 STATEMENT

All parties are listed in the caption. The parent companies of Respondent Residential Funding Corporation ("RFC") are: GMAC-RFC Holding Corporation; GMAC Mortgage Group, Inc.; General Motors Acceptance Corporation; and General Motors Corporation. General Motors Corporation is the only publicly-held company that owns 10% or more of RFC's stock.

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## COUNTERSTATEMENT OF THE OPINIONS BELOW

The advance sheet attached to the Petition For Writ of Certiorari (the "Petition") as Exhibit A is not a true copy of the opinion of the court of appeals. By order dated August 19, 2004 (Exhibit A hereto), the court of appeals corrected the first line on page three of that advance sheet. The court of appeals' opinion is accurately reported at 380 F.3d 1027.

## COUNTERSTATEMENT OF THE CASE

### I. THE COURT OF APPEALS' DECISION IS UNREMARKABLE AND PROVIDES NO BASIS FOR THIS COURT'S REVIEW.

This case presents no compelling issues that merit this Court's review. The court of appeals, correctly recognizing that the Supreme Court of Illinois has not addressed the question of state law raised by Respondent's interlocutory appeal, properly discharged its responsibility to ascertain Illinois law by using all available data to predict how the Supreme Court of Illinois would decide the issue. The court of appeals' approach to ascertaining state law is not novel. It is wholly consistent with the approach taken by this Court and other federal courts of appeals, and it in no way violates principles of federalism.

### II. COUNTERSTATEMENT OF FACTS MATERIAL TO THE PETITION

#### A. The District Court Refuses To Follow Controlling Seventh Circuit Precedent

Petitioners obtained high-interest second mortgage loans from Mortgage Capital Resources Corporation

("Mortgage Capital"). They contend that Mortgage Capital violated the Truth-in-Lending Act,[1] the Real Estate Settlement Practices Act,[2] and the Illinois Interest Act[3] by charging them excessive closing fees and engaging in prohibited fee-splitting. Petitioners did not name Mortgage Capital as a defendant. Instead, they seek relief only from Respondent Residential Funding Corporation ("RFC"). RFC had purchased Petitioners' notes (as part of larger mortgage pools) in the secondary market, and Petitioners seek to hold RFC liable (as the assignee of their loans) under a provision of the Home Ownership and Equity Protection Act, 15 U.S.C. § 1641(d)(1).

In the count of their complaint that is relevant to the Petition, Petitioners allege that they were charged closing costs and other charges that exceeded 3% of the principal value of their loans, in violation of § 4.1a(f) of the Illinois Interest Act. That provision provides, in relevant part:

> Where there is a charge in addition to the stated rate of interest payable directly or indirectly by the borrower and imposed directly or indirectly by the lender as a consideration for the loan, . . . whether denominated "points," "service charge," "discount," "commission," or otherwise, ... the rate of interest shall be calculated in the following manner:

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1 15 U.S.C. § 1601, *et seq.*

2 12 U.S.C. § 2601, *et seq.*

3 815 ILCS 205/4.1a(f).

> The percentage of the principal amount of the loan represented by all of such charges shall first be computed, which in the case of a loan with an interest rate in excess of 8% per annum secured by residential real estate . . . shall not exceed 3% of such principal amount.[4]

Section 4.1a(f) thus limited the aggregate non-interest charges associated with certain residential mortgage loans to 3% of the principal amount of the loan.

RFC moved to dismiss Petitioners' claim under the Illinois Interest Act pursuant to Federal Rule of Civil Procedure 12(b)(6). In its motion, RFC advised the district court that the U.S. Court of Appeals for the Seventh Circuit had held that § 4.1a(f) of the Illinois Interest Act had been impliedly repealed when the Illinois General Assembly amended other portions of the Act in 1981.

Through those comprehensive amendments, the Illinois General Assembly sought to increase the availability of funds for home financing that had been restricted by the Interest Act's limits on interest rates and fees associated with real estate loans. *Currie v. Diamond Mortgage Corp.*, 859 F.2d 1538, 1543 (7th Cir. 1988) (citing Transcript of Ill. Senate Debates, 82d Gen. Assembly June 23, 1981)). One of the 1981 amendments, the new § 4(1)(*l*), expressly provides:

> It is *lawful* to charge, contract for, and receive *any rate or amount of interest or compensation* with respect to the following transactions: . . .

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4 815 ILCS 250/4.1a(f). This provision was last amended in 1978.

> (f) loans secured by a mortgage on real estate.

815 ILCS 205/4(1)(*l*) (as amended) (emphasis added).

The General Assembly thereby made the policy decision that it was better for credit to be available at rates higher than the statutorily-imposed rates then in effect than for credit not to be available at all. Illinois Office of Banks and Real Estate, Interp. Letter No. 98-01 (Jan. 16, 1998) (Exhibit B hereto). *See* n. 13, *infra*.

The court of appeals recognized in *Currie* that if the old § 4.1a(f) were allowed to stand alongside the amended § 4(1)(*l*), the result would be incongruous. The Act simultaneously would *limit* the amount of points lenders are permitted to charge on certain residential mortgage loans but would specifically *permit* lenders to charge *any amount* of interest and *any amount* of compensation for such loans. *Currie*, 859 F.2d at 1543. The court of appeals has never reversed *Currie* or called it into question. To the contrary, the court of appeals referred to *Currie* with approval in a decision issued ten years later. *Jackson v. Resolution GGF Oy*, 136 F.3d 1130, 1131 (7th Cir. 1998).

The district court nonetheless elected not to follow the controlling precedent from the court of appeals, and denied RFC's motion to dismiss. The district court opted instead to follow two decisions by one of Illinois' five intermediate appellate courts (the Court of Appeals for the First District), which held that § 4.1a(f) of the Illinois Interest Act is still good law.[5]

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5 *U.S. Bank, Nat'l Ass'n v. Clark*, 348 Ill. App.3d 856, 807 N.E.2d 1109 (1st Dist. 2004), *appeal allowed*, __ N.E.2d __ (Ill. Nov. 24, 2004) ("*Clark*"); *Fidelity Financial Services, Inc. v. Hicks*, 214 Ill. App.3d 398, 574 N.E.2d 15

Continued on following page

### B. The Court Of Appeals Accepts Interlocutory Review And Reverses

Recognizing that other district judges (including one in its own district) were *following* the Seventh Circuit's holding in *Currie*,[6] the district court granted RFC's petition to certify its order for an interlocutory appeal pursuant to 28 U.S.C. § 1292(b). The court of appeals accepted the interlocutory appeal, ratified its previous holding in *Currie*, and directed the district court to dismiss Petitioners' claim under § 4.1a(f) of the Illinois Interest Act.

The court of appeals did not (as Petitioners contend) ignore the cases the Illinois Court of Appeals for the First District decided after *Currie (Hicks* and *Clark)*. Rather, the court of appeals expressly considered and discussed those opinions, but concluded that neither of them demonstrated that the court of appeals' original prediction (in *Currie)* of how the Supreme Court of Illinois would decide the issue was wrong. *Reiser*, 380 F.3d at 1029-30.

After the court of appeals denied Petitioners' untimely motion for rehearing *en banc,* Petitioners invoked this Court's *certiorari* jurisdiction.

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(1st Dist. 1991), *appeal denied*, 141 Ill.2d 539, 580 N.E.2d 112 ("*Hicks*").

6 *Spann v. Community Bank*, No. 03 C 7022, 2004 WL 691785 *10 (N.D. Ill. Mar. 30, 2004); *Krone v. 125 Home Loan Owner Trust,* No. 01-cv-0691-MJR at 10 (S.D. Ill. Aug. 27, 2003) (unpublished) (Exhibit C hereto).

## REASONS FOR DENYING THE WRIT

### I. THE COURT OF APPEALS' APPROACH TO PREDICTING STATE LAW DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT.

The court of appeals' methodology for predicting state law in the absence of controlling authority from the state's highest court does not conflict with any decision of this Court. This Court does not (as the Petition contends) require the inferior federal courts to adhere blindly to the decisions of an intermediate state appellate court. Rather, this Court regularly recognizes that the federal courts have an independent obligation to predict, by reference to *all* appropriate information, how the state's highest court would decide the issue. The court of appeals did just that.

Petitioners' reliance on cases this Court decided over a two-week period in 1940 is misplaced.[7] Petitioners overstate the holdings of those cases and ignore the developments and refinements in this Court's *Erie* jurisprudence over the intervening six decades.[8]

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7 *West v. American Tel. & Tel. Co.*, 311 U.S. 223, 237, 61 S. Ct. 179, 183 (1940); *Six Companies of California v. Joint Highway Dist. No. 13 of State of California*, 311 U.S. 180, 188, 61 S. Ct. 186, 188 (1940); *Fidelity Union Trust Co. v. Field*, 311 U.S. 169, 178-79, 61 S. Ct. 176, 178 (1940); and *Stoner v. New York Life Ins. Co.*, 311 U.S. 464, 467, 61 S. Ct. 336, 339 (1940).

8 *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817 (1938).

### A. Petitioners Overstate The Holdings In The *West* Line Of Cases.

In *West*, this Court criticized the court of appeals for rejecting a decision of an intermediate state appellate court in favor of what the federal court independently considered to be "the better rule." *West*, 311 U.S. at 235, 61 S. Ct. at 183. This Court held that federal courts were not "free to choose their own rules of decision" just because "the highest court of the state has not spoken." *Id.*, 311 U.S. at 236, 61 S. Ct. at 183. Rather, a federal court sitting in diversity is required to "ascertain from *all the available data* what the state law is and apply it . . . ." *Id.* The Court expressly recognized in this regard that a ruling by an intermediate appellate state court is but "a datum" in the *Erie* analysis. *Id.* Also central to this Court's criticism of the court of appeals' approach in *West* was the fact that the state court decision it ignored was rendered in a dispute between the very same parties. *Id.*, 311 U.S. at 238, 61 S. Ct. at 184.

In *Field* (decided the same day as *West*), this Court criticized the court of appeals for disregarding several decisions of the New Jersey Court of Chancery that addressed the constitutionality of a New Jersey statute. *Field*, 311 U.S. 169, 61 S. Ct. 176. Other than those opinions, there was "no other evidence" of how the Supreme Court of New Jersey might rule on that issue. *Id.*, 311 U.S. at 178, 61 S. Ct. at 178. In those limited circumstances, this Court concluded that it was improper for the court of appeals to analyze the question independently and without any regard for the trial court's interpretation of New Jersey law. *Id.*

Similarly, in *Six Companies of California* (also decided the same day) there was "no convincing evidence" of what the law of the state was other than the opinion of the intermediate court of appeals that the federal court of appeals

had disregarded. *Six Companies of California*, 311 U.S. at 188, 61 S. Ct. at 188.

*Stoner*, like *West*, involved the court of appeals' refusal to credit the decisions of a state court on "the precise question in issue" "between the same parties" to the federal litigation. *Stoner*, 311 U.S. 464, 467, 61 S. Ct. 336, 338. In short, the holdings of all four of these cases are far more circumscribed than the Petition admits.

### B. This Court Has Re-Affirmed That The Federal Courts Are Not Bound By Decisions of Inferior State Courts.

Since the 1940's, this Court consistently has backed away from any notion that federal judges are to reflexively consider themselves bound by the rulings of any state court other than the state's highest authority. This change in emphasis from dicta in the *West* line of cases began as early as 1948. *King v. Order of United Commercial Travelers of America*, 333 U.S. 153, 68 S. Ct. 488 (1948).

In *King*, this Court affirmed a court of appeals' decision not to follow a decision of a state trial court that was directly on point. Rather, this Court held that the court of appeals was correct in "proceed[ing] to make its own determination" of how the Supreme Court of South Carolina probably would rule on the question of South Carolina law. *King*, 333 U.S. at 161, 68 S. Ct. at 492. Central to this Court's reasoning in *King* was the premise that it would be "incongruous" to adopt a rule that bound the federal courts to a state court decision to an extent greater than that decision bound other state courts. *Id.*

In 1967, this Court confirmed that the *West* line of cases (like *King*) stood only for the proposition that a decision of an inferior state court is but a "datum" to which a federal court must give "proper regard." *Commissioner of*

*Internal Revenue v. Estate of Bosch*, 387 U.S. 456, 465, 87 S. Ct. 1776, 1782 (1967) ("under some conditions, federal authority may not be bound even by an intermediate state appellate court ruling"). Such decisions, including the decisions of intermediate state courts of appeal, are not definitive pronouncements of state law that bind the federal courts. *Estate of Bosch*, 387 U.S. at 465, 87 S. Ct. at 1782.

The court of appeals here complied in all respects with this Court's *Erie* jurisprudence, as expressed in the *West* series of cases, *King*, and *Estate of Bosch*.

### C. The Court Of Appeals Considered The Current State of The Law.

Petitioners also contend that the court of appeals failed to take Illinois law as it found it when this case came before the court. Petition at 14, citing *Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538, 543, 61 S. Ct. 347, 350 (1941).

Although Petitioners' argument accurately states the holding of *Vandenbark*, it begs the ultimate question: whether Illinois law *had in fact changed* since the court of appeals decided *Currie*. Because the Supreme Court of Illinois had not addressed the continued viability of § 4.1a(f) of the Illinois Interest Act in the sixteen years since the court of appeals had decided *Currie*, the court of appeals properly declined to revisit that question here as if it were deciding it for the first time.

Moreover, the court of appeals properly recognized that developments at the state level since 1988 actually lent support to its reading of the Illinois Interest Act in *Currie*. *Reiser*, 380 F.3d at 1029 ("[b]oth the Attorney General of Illinois and the agency that regulates banking under Illinois law have issued advisory opinions consistent with *Currie*"). In February 1989, for example, the Legal Counsel of the

Illinois Department of Financial Institutions issued an opinion letter in which it expressly adopted both the reasoning behind and the holding in *Currie*.[9] The Department of Financial Institutions expressly held in that opinion that the 1981 amendments to § 4(1)(*l*) "are so clearly inconsistent with the points limitation in Section 4.1a of the Statute that such limitation is necessarily repealed." *See also Jackson v. Resolution GGF Oy*, 136 F.3d 1130, 1134 (7th Cir. 1998) (describing the author of this opinion letter as the "top lawyer at the state agency" that regulates financial institutions, and holding that a mortgage lender's reliance on that letter insulated it from liability under the Interest Act's "safe harbor").

In 1996, the Attorney General of Illinois also cited with approval (in a letter to the Director of the Department of Financial Institutions) the alternative holding in *Currie* – that § 501 of the Depository Institutions Deregulation and Monetary Control Act of 1980 ("DIDMCA")[10] preempted all of § 4.1a of the Illinois Interest Act.[11] Indeed, in that opinion letter, the Attorney General mentioned, but attributed little to no importance to, the contrary suggestion made in *Hicks*.[12]

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9 Ill. Dept. of Fin. Inst., Opinion Letter (Feb. 28, 1989) (Exhibit D hereto). The Department of Financial Institutions is now a division in Illinois' Department of Financial and Professional Regulation.

10 12 U.S.C. § 1735f-7.

11 Ill. Atty. Gen. Op. 96-037 (Dec. 3, 1996) (Exhibit E hereto). *See Currie*, 859 F.2d at 1542.

12 Ill. Atty. Gen. Op. 96-037. Opinion 96-037 is still posted on the official government website

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In 1998, the Illinois Office of Banks and Real Estate ("OBRE") issued an opinion that also expressly endorsed *Currie's* holding that § 4.1a(f) of the Illinois Interest Act had been impliedly repealed.[13] The OBRE in fact built on the reasoning of *Currie* to conclude that, just as the limitation on fees set forth in § 4.1a(f) had been impliedly repealed in 1981, so, too, had the limitation on interest rates set forth in § 4a(a)(i).[14] The OBRE's opinion letter was distributed to mortgage lenders throughout Illinois, and still appears –

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(www.ag.state.il.us/opinions/1996/96-037.html). Although the Attorney General recently has reversed its position on the preemptive effect of § 501 of the DIDMCA, the Attorney General has not expressed any disapproval of the court of appeals' conclusion in *Currie* that § 4.1a(f) of the Illinois Interest Act had been impliedly repealed.

13 Ill. Office of Banks and Real Estate, Interp. Letter No. 98-01 (Jan. 16, 1998) (Exhibit B hereto). The OBRE is now a division in the Illinois Department of Financial and Professional Regulation. *See* 20 ILCS 3205/0.4. The Division of Banks and Real Estate "oversees the regulation and licensure of State chartered banks, trust companies, ATMs not owned by financial institutions, check printers, pawnbrokers, savings banks and savings and loan associations, mortgage bankers and brokers, real estate brokers and salespersons, appraisers, auctioneers, home inspectors, leasing agents, and time share companies." *See* OBRE website (www.obre.state.il.us). *See also* 20 ILCS 3205/5, 3205/6 (describing the powers and duties of the OBRE).

14 OBRE, Interp. Letter No. 98-01 (interpreting 815 ILCS 205/4a(a)(i)).

without qualification or limitation – on the official government website.[15]

Although these opinion letters do not have the force of law in Illinois, the state courts of Illinois nonetheless give such opinions of state regulators considerable respect. *Mattis v. State Universities Retirement System*, 212 Ill.2d 58, 816 N.E.2d 303, 313 (2004) ("we accord deference to the interpretation of a statute by the agency charged with its administration"); *Shields v. Judges' Retirement System of Illinois*, 204 Ill.2d 488, 492, 791 N.E.2d 516 (2003). *Accord Rockwood Holding Co. v. Dep't of Revenue*, 312 Ill. App.3d 1120, 1123, 728 N.E.2d 519 (2000) (courts "defer to an administrative agency's interpretations and enforcement of statutes because of the considerable experience and expertise it may have concerning the issues before it"); *West Belmont L.L.C. v. City of Chicago*, 349 Ill. App.3d 46, 49, 811 N.E.2d 220, 224 (2004) ("we accord substantial weight and deference to an agency's interpretation because agencies are an informed source for ascertaining the legislature's intent").

The court of appeals therefore acted properly in recognizing that these interpretations, too, are "data" that should influence any prediction as to how the Supreme Court of Illinois might rule when it faces the issue.

District courts within the Seventh Circuit also have concluded, based on *their* independent review of the Interest Act, that *Currie* was correct in its prediction that the Supreme Court of Illinois would find the plain language of old § 4.1a(f) to be irreconcilable with the language and purpose of the 1981 amendments. *Krone v. 125 Home Loan Owner Trust*, No. 01-CVC-0691-MJR, slip op. at 10 (S.D.

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15 www.obre.state.il.us/cbt/legal/intrltr/btil9801.pdf.

Ill. Aug. 27, 2003) (Exhibit C hereto); *Spann v. Community Bank of North Virginia*, 2004 WL 691785, *10 (N.D. Ill. Mar. 30, 2004) (referencing the "clear inconsistencies between the plain language of the 1981 amendments to Section 4 of the General Interest Statute and the language of Section 4.1a of the Act" as a reason to follow *Currie*).

The court of appeals considered *all* of these intervening developments (including the decisions in *Hicks* and *Clark*). In view of the conflict between the decisions of one intermediate appellate court and the Illinois regulators, the court of appeals prudently deemed it "best to stick with one assessment until after the state supreme court, which alone can end the guessing game, does so." *Reiser*, 380 F.3d at 1029.

## II. THE COURT OF APPEALS' APPROACH IS CONSISTENT WITH THE APPROACH TAKEN BY OTHER FEDERAL COURTS OF APPEALS.

Petitioners' contention that the court of appeals created a conflict among the federal courts of appeals also is unfounded.[16] The federal courts of appeals regularly decline to follow the decisions of an intermediate state appellate court if they conclude, based on all relevant data, that the state's highest court would apply a different legal standard.[17] The approach the court of appeals took here was no different.

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16 Petition at 15.

17 *See, e.g., Ground Air Transfer, Inc. v. Westates Airlines, Inc.*, 899 F.2d 1269 (1st Cir. 1990); *Competex, S.A. v. LaBow*, 783 F.2d 333, 351 n.16 (2d Cir. 1986); *Fisher v. USAA Casualty Ins.* Co., 973 F.2d 1103 (3d Cir. 1992); *Adams v. Star Enterprise*, 51 F.3d 417 (4th Cir. 1995); *Industrial Indem. Co. v. Chapman & Cutler*, 22 F.3d 1346

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Petitioners' alternate contention – that the court of appeals announced "new standards" that put district courts in a "dilemma" – also is unfounded.[18] The court of appeals' approach – to consider but not consider itself bound by – the decisions of the intermediate state court of appeals is well-established within the Seventh Circuit.[19]

Moreover, far from putting the district courts in a "dilemma," the court of appeals' insistence that the district courts respect the court of appeals' prediction of state law until and unless the state's highest authority speaks to the question actually *relieves* the district courts of an obligation to re-evaluate state law each and every time an intermediate state appellate court (or a state trial court) issues an opinion. This respect for the judicial hierarchy (that Petitioners decry

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(5th Cir. 1994); *FL Aerospace v. Aetna Cas. & Sur. Co.*, 897 F.2d 214 (6th Cir. 1990), *cert. denied*, 498 U.S. 911, 111 S. Ct. 284; *Swope v. Siegel-Robert, Inc.*, 243 F.3d 486 (8th Cir. 2001), *cert. denied*, 534 U.S. 887, 122 S. Ct. 198; *Chemstar, Inc. v. Liberty Mut. Ins. Co.*, 41 F.3d 429 (9th Cir. 1994), *cert. denied*, 517 U.S. 1219, 116 S. Ct. 1847 (1996); *Stuart v. Colorado Interstate Gas Co.*, 271 F.3d 1221 (10th Cir. 2001); *Sales v. State Farm Fire & Cas. Co.*, 849 F.2d 1383 (11th Cir. 1988).

18 Petition at (i), 16.

19 *See, e.g., McGeshick v. Choucair*, 9 F.3d 1229, 1232 (7th Cir. 1993), *cert. denied*, 517 U.S. 1212, 116 S. Ct. 1834 (1996); *Eljer Mfg., Inc. v. Liberty Mut. Ins. Co.*, 972 F.2d 805, 814 (7th Cir. 1992) (Posner, J.), *cert denied*, 507 U.S. 1005, 113 S. Ct. 1646 (1993).

as "unconstitutional") is an integral feature of the federal court system.[20]

## III. THE COURT OF APPEALS' APPROACH RESPECTS PRINCIPLES OF FEDERALISM AND DISCOURAGES FORUM SHOPPING.

The court of appeals also did not (as Petitioners contend) violate "fundamental principles of federalism" when it declined to follow two decisions of a single intermediate state court on a matter of state law. In a judicial system wherein both federal courts and state courts have the power and the duty to interpret and apply state law, differences of opinion like those that have manifested themselves here are neither uncommon nor unexpected. *See* n. 17, *supra* (all examples of situations where a federal court of appeals' prediction of state law differed from the rulings of one or more intermediate state courts).

Neither the court of appeals' approach to ascertaining Illinois law nor its ultimate interpretation of Illinois law encourages litigants to "forum shop" between the state and federal courts in Illinois. Central to the *Erie* doctrine is the principle that questions of state law should be decided in federal court on the same terms as if they had been decided in the state court system, through and including the state's highest judicial authority.

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20 *State Oil Co. v. Khan*, 522 U.S. 3, 20, 118 S. Ct. 275, 284 (1977) (court of appeals was correct to follow a "wobbly" precedent of this Court, "for it is this Court's prerogative alone to reverse one of its precedents"). *Accord Rodriquez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484, 109 S. Ct. 1917, 1921-22 (1989).

Giving the decisions of an inferior state court more of a binding effect than they would have in the state court system itself "would undermine the ability of the federal courts to ensure that the outcome of the litigation be substantially the same as it would be if tried in a state court and subjected to that system's appellate process." C. Wright & A. Miller, 19 Fed. Prac. & Proc. Juris.2d § 4507 (2004). By requiring federal courts to make their best efforts to predict, based on all pertinent data, how the highest court of the state would rule on the issue (instead of relying on potentially conflicting and changing decisions by one or more inferior courts), parity between the state and federal courts is encouraged and preserved. *See, e.g., King v. Order of United Commercial Travelers of America*, 333 U.S. 153, 159, 68 S. Ct. 488, 492 (1948) (requiring adherence to the decisions of an inferior state court may well *not* provide "uniformity in the application of" state law, given the potential for conflicting decisions among the inferior state courts and the potential for reversal or modification by the state's highest court).

## IV. THE COURT OF APPEALS' CONSTRUCTION OF THE ILLINOIS INTEREST ACT IS NOT DEMONSTRABLY WRONG, AND IF IT WERE, THE SUPREME COURT OF ILLINOIS IS IN THE BEST POSITION TO ADDRESS IT.

The court of appeal's determination that § 4.1a(f) of the Illinois Interest Act was impliedly repealed in 1981 is not demonstrably wrong or otherwise deserving of this Court's review. The court of appeals properly recognized in *Currie* that the entire "deregulatory impetus" of the 1981 amendments to Illinois' interest statutes was inconsistent with the limitation on fees associated with real estate loans set forth in § 4.1a(f). *Currie*, 859 F.2d at 1543. Illinois' regulators' *agreement* with *Currie* dispels any argument that this case warrants this Court's intervention.

In any event, the Petition also should be denied for the independently compelling reason that the court of appeals' decision does not have the far-ranging reach Petitioners ascribe to it. If the decision were in error, the Supreme Court of Illinois is best-positioned to address it. The Supreme Court of Illinois recently accepted a discretionary appeal in *U.S. Bank Nat'l Ass'n v. Clark*.[21] One of the bases on which the lenders in *Clark* sought and obtained discretionary review was their request that the Court resolve the split of authority between *Hicks* and *Clark* on the one hand and *Currie* (and this case) on the other.[22]

As the court of appeals correctly observed, the Supreme Court of Illinois is the only court in a position to end the "guessing game" over the continued viability of § 4.1a(f) of the Illinois Interest Act. Now that it has agreed to do so, there is no compelling reason why this Court should exercise its certiorari jurisdiction to hear this case.

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21 *U.S. Bank Nat'l Ass'n v. Clark*, 348 Ill. App.3d 856, 807 N.E.2d 1109 (1st Dist. Mar. 31, 2004), *appeal allowed*, __ N.E.2d __ (Ill. Nov. 24, 2004).

22 *See* Joint Petition For Leave To Appeal Or, In The Alternative, For Appeal As A Matter Of Right in *Clark* at pp. 18-19.

## CONCLUSION

The court of appeals' decision is in accord with the caselaw of this Court, is consistent with approaches taken by other federal courts of appeals, and does not conflict with any decision of the Supreme Court of Illinois. Because Petitioners have not identified any other compelling reason why this Court should exercise its certiorari jurisdiction to hear this case, the Petition should be denied.

DATED: December 27, 2004

Respectfully submitted,

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# APPENDIX

*United States Court of Appeals*
For the Seventh Circuit
Chicago, Illinois 60604

August 19, 2004

Before

Hon. WILLIAM J. BAUER, Circuit Judge

Hon. FRANK H. EASTERBROOK, Circuit Judge

Hon. DANIEL A. MANION, Circuit Judge

| | |
|---|---|
| EDWARD and PAMELA REISER, and JANET GREENLEE, *Plaintiffs-Appellees,* | ) Appeal from the ) United States ) District Court for the |
| No. 04-8017 v. | ) Southern District ) of Illinois. |
| RESIDENTIAL FUNDING CORPORATION, *Defendant-Appellant.* | ) No. 03-CV-0619-DRH ) David R. Herndon, ) *Judge.* |

**Order**

The opinion of the court issued today is amended as follows:

Page 3, first line, change "two decisions by the state's five intermediate appellate" to "two decisions by one of the state's five intermediate appellate".

**Interpretive Letter No. 98-01 (January 16, 1998)**

**Loans secured by a real estate mortgage are governed by Section 4(1)(1), and not Section 4a(a)(i), of the Interest Act.**

This letter responds to your inquiry regarding the Illinois Interest Act ("Act") [815 ILCS 205/0.01 et seq.], and in particular whether loans that are secured by a real estate mortgage are governed by Section 4(1)(1) [815 ILCS 205/4(1)(1)] or Section 4a(a)(i) [815 ILCS 205/4a(a)(i)] of the Act. For the reasons set forth in this letter, we conclude that Section 4(1)(1) is the controlling section and therefore, any rate of interest may be charged for loans secured by a mortgage on real estate.

Section 4(1) of the Act, which governs written contracts for "money loaned or in any manner due and owing," generally provides for a 9% interest rate limitation. However, over time, the General Assembly has added numerous exemptions to that limit resulting in 14 types of loan transactions for which it is lawful to charge, contract for, and receive any rate or amount of interest or compensation. The earliest exemptions were obviously business or commercial in nature causing one court to conclude that, "The statute is quite apparently designed to protect only relatively small, personal, non-business borrowers from high interest rates." Koos v. First National Bank of Peoria, 496 F.2d 1162, 1164 (1974).

In 1982, the Illinois General Assembly amended Section 4(1)(1) of the Act to state, "It is lawful to charge, contract for, and receive any rate or amount of interest or compensation with respect to...loans secured by a mortgage on real estate." The legislative intent of 4(1)(1) was "to increase the availability of funds for home financing previously restricted by the statute's limit on interest rates and fees associated with real estate loans." Currie v. Diamond Mortgage Corporation, 859 F.2d 1538, 1543 (1988). To paraphrase Currie, the General Assembly concluded that available credit at higher than statutorily imposed rates is better than having no credit.

Federal law is useful in partially resolving the conflict between Sections 4(1)(1) and 4a(a)(i). Section 501 of the federal

Depository Institutions Deregulation and Monetary Control Act of 1980 (DIDMCA) invalidates state laws which expressly limit the rate or amount of interest on loans secured by a first lien on residential real property. 12 U.S.C. §1735f-7a. The Illinois Attorney General has concluded that DIDMCA has partially preempted 4.1a of the Act [815 ILCS 205/4.Ia] which limits, to 3% of principal, the amount of charges a lender may charge on loans secured by residential real estate with an interest rate over 8%. Illinois Attorney General Opinion #96-037 (12-3-96). Similarly, DIDMCA would preempt Section 4a(a)(i) to the extent it applies to loans secured by a first lien on residential property.

Regarding loans not preempted by DIDMCA, the discussion in Currie is instructive. In Currie, the court was asked to reconcile Section 4(1)(l) with Section 4.1a. Discussing U.S. v. Will [449 U.S. 200 (1980)], the court said that although repeal by implication is strongly disfavored by the courts, it will be invoked if "a statute enacted later in time is repugnant to an earlier statute such that the two acts cannot stand together." Currie, 1542. Using this analysis, the court ruled that the "deregulatory impetus" of Section 4(1)(l) is inconsistent with the limitation on fees contained in Section 4.1a and that Section 4.1a was therefore implicitly repealed. Id., 1543. Similarly, we believe that this legislative intent of Section 4(1)(l) is equally inconsistent with the interest rate limitations of Section 4a(a)(i), that the two provisions cannot stand together, and that Section 4(1)(l) should apply to installment loans secured by real estate.

Finally, as you stated in your letter, if the Section 4a interest restriction were applied to real estate loans despite the permissive language of Section 4(1)(l), it would be equally applicable to the other types of loans exempted in Section 4(1). Applying the 9% limit to loans such as corporate loans and business loans would be contrary to long standing interpretations that these "exempt" loans are limited only by the terms negotiated between the lender and the borrower, and not governed by Section 4a.

Thus, based on the legislative intent of Section 4(1)(l), federal preemption by DIDMCA, the analogous holding of Currie, and

the unexpected and unintended results that would otherwise result for other "exempt" loans, we conclude that loans secured by real estate are governed by Section 4(1)(l), and not Section 4a(a)(i) of the Act.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

| | | |
|---|---|---|
| MICKEY KRONE and LINDA KRONE, | ) | |
| | ) | |
| Plaintiffs, | ) | |
| | ) | |
| vs. | ) | Case No. |
| | ) | 01-cv-0691-MJR |
| 125 HOME LOAN OWNER TRUST, | ) | |
| | ) | |
| Defendant. | ) | |

**MEMORANDUM and ORDER**

REAGAN, District Judge:

**I. Introduction**

Two of numerous named Defendants removed this case from the Circuit Court of Madison County, Illinois in October 2001. The Court determined that it could exercise subject matter jurisdiction under 28 U.S.C. § 1332, as all parties were completely diverse, and the amount in controversy exceeded $75,000.[1]

In March 2002, Plaintiffs filed an amended class action complaint herein. (Doc. 90). Via that complaint plus a series of Orders entered by the Court, this action has been reduced to the claims of two Plaintiffs, Mickey and Linda Krone, against one Defendant, 125 Home Loan Owner Trust ("HLOT-125"). In a June 2003 Order, the Court clarified that these were the only remaining parties (*see* Doc. 203).

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1 Plaintiff Mickey Krone sought $138,970 in damages.

The discovery deadline now has passed, and trial is scheduled for December 2, 2003. If the Krones seek to proceed as a class, they must move for class certification by September 2, 2003. HLOT-125 has twenty days from the *filing* of that motion to file a brief opposing certification.

In the meantime, one pending motion requires resolution – HLOT-125's June 3, 2003 motion to dismiss with prejudice the amended complaint. The Krones obtained two extensions of time (through July 14, 2003) to file their memorandum opposing dismissal. HLOT-125 filed its reply brief on July 28, 2003. The motion now is fully briefed.

It may well be that HLOT-125's motion was not timely filed.[2] But the Court has permitted briefing on this motion and recognizes that confusion exists in the record as to the dispositive motion deadline. Moreover, the Krones never challenged the June 3, 2003 dismissal motion as belatedly filed. For these reasons, the Court turns to the merits of the pending motion, beginning with reference to the legal standards governing review.

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2 The original dispositive motion deadline was extended several times. Magistrate Judge Clifford J. Proud's November 21, 2002 Order amended the Scheduling and Discovery Order to permit dispositive notions to be filed through January 31, 2003 (see Doc. 162). The undersigned District Judge extended at least one Defendant's dispositive motion deadline to February 4, 2003 (see Doc. 170). The docketing sheet and Court file reveal no further extension of the dispositive motion deadline. When the parties successfully obtained an extension of the Scheduling and Discovery Order in June 2003, they did not include a revised dispositive motion deadline (see Doc. 201 and attachments). Judge Proud's Order adopting their proposed schedule did not set a new dispositive motion deadline either. Thus, it is possible that dispositive motions were due by January 31, 2003 or February 4, 2003.

## II. Applicable Legal Standard

HLOT-125 seeks dismissal under FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6) and FEDERAL RULE OF CIVIL PROCEDURE 12(b)(1).

Dismissal motions filed under Rule 12(b)(6) attack the sufficiency of the plaintiff's claims, whereas dismissal motions filed under Rule 12(b)(1) challenge the subject matter jurisdiction of the Court (including, as here, a party's standing to bring suit).

When reviewing a complaint in the context of a dismissal motion filed under Rule 12(b)(6), the Court accepts as true all well-pled factual allegations and resolves in the plaintiff's favor all reasonable inferences. ***Echevarria v. Chicago Title & Trust Co.*, 256 F.3d 623, 625 (7th Cir. 2001), *citing Transit Express, Inc. v. Ettinger*, 246 F.3d 1018, 1023 (7th Cir. 2001).**

Dismissal for failure to state a claim is proper only if the plaintiff can prove no set of facts in support of his claims which would entitle him to relief. ***Alper v. Altheimer & Gray*, 257 F.3d 680, 684 (7th Cir. 2001), *citing Conley v. Gibson*, 355 U.S.41, 45-46 (1957), and *Veazey v Communications & Cable of Chicago, Inc.*, 194 F.3d 850, 854 (7th Cir. 1999).** If it is possible to hypothesize a set of facts, consistent with the complaint, that would entitle the plaintiff to relief, dismissal under Rule 12(b)(6) is inappropriate. ***Alper* at *684, quoting Veazey*, 194 F.3d at 854.**

Similarly, when reviewing a dismissal motion under Rule 12(b)(1), "a court must accept as true all well-pleaded factual allegations and draw all reasonable inferences in favor of the plaintiff." ***Alicea-Hernandez v. Catholic Bishop of Chicago*, 320 F.3d 698, 701 (7th Cir. 2003), citing Long v. Shorebank Dev. Corp., 182 F.3d 548, 554 (7th Cir. 1999).**

There are circumstances, however, in which a Court assessing a Rule 12(b)(1) motion "may look beyond the

jurisdictional allegations of the complaint and view whatever evidence has been submitted on the issue to determine whether in fact subject matter jurisdiction exists: ***Id.***[3]

The United States Court of Appeals for the Seventh Circuit has explained:

> If subject matter jurisdiction is not evident on the face of the complaint, the motion to dismiss pursuant to Rule 12(b)(1) would be analyzed as any other motion to dismiss, by assuming for purposes of the motion that the allegations in the complaint are true. However,...if the complaint is formally sufficient but the contention is that there is *in fact* no subject matter jurisdiction, the movant may use affidavits and other material to support the motion. The burden of proof on a 12(b)(1) issue is on the party asserting jurisdiction.... And the court is free to weigh the evidence to determine whether jurisdiction has been established.

***United Phosphorus, Ltd v. Angus Chemical Co.*, 322 F.3d 942, 946 (7th Cir. 2003).**

In the case at bar, however, the only Rule 12(b)(1) dismissal arguments were directed to two parties no longer in the case – Plaintiffs Woodrow and Louise Moad. Because they already have been dismissed from this action (*see* June 13, 2003 Order), the Court need not reach the Rule 12(b)(1) dismissal argument presented by HLOT-125. Thus, the Court focuses on the arguments for dismissal under Rule 12(b)(6).

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3 By contrast, a Court considering a Rule 12(b)(6) motion may <u>not</u> consider materials "outside the pleadings."

## III. Analysis

The Krones are Illinois homeowners who obtained second mortgage loans from First National Mortgage Exchange ("1st National"). The Krones allege that 1st National charged deceptive and illegal fees in connection with this loan. Specifically, the Krones claim that 1st National charged costs and fees that violated the Illinois Interest Act, **815 ILCS 205/4.1a, *et seq.***

The Krones' loan later was purchased by HLOT-125. The Krones contend that HLOT-125, as the holder of the 1st National loan, remains liable for 1st National's lending violations. The Krones offer two bases for this liability: (1) Illinois assignee liability law, and (2) the Federal Homeowners Equity Protection Act ("HOEPA"), **15 U.S.C. § 6001, *et seq.***

In pleadings subsequent to their, amended complaint, the Krones "withdrew" (*i.e.*, abandoned) all claims under the Illinois Consumer Fraud and Deceptive Business Practices Act. *See* Doc. 210, p. 2.[4] That leaves only the Krones' claims under the Illinois Interest Act.

More specifically, the Krones' cause of action against HLOT-125 is based on § 4.1a(f) of the Illinois Interest Act, which governs "charges for items paid or incurred in connection with loans." Section 4.1a(f) provides:

> Where there is a charge in addition to the stated rate of interest payable directly or indirectly by the borrower and imposed directly or indirectly by the lender as a consideration for the loan, ... whether

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4 The Krones also have "withdrawn" any claims that the Moad Plaintiffs have against HLOT-125 (Doc. 210, p. 2). But Woodrow and Louise Moad no longer are Plaintiffs herein. *See* Court's June 13, 2003 Order (Doc. 230, p. 1).

> denominated "points," "service charge," "discount," "commission," or otherwise, ... the rate of interest shall be calculated in, the following manner:
>
> The percentage of the principal amount of the loan represented by all of such charges shall first be computed, which in the case of a loan with an interest rate in excess of 8% per annum secured by residential real estate, other than loans described in paragraphs (e) and (f) of Section 4, shall not exceed 3% of such principal amount.

Stated simply, as to loans with an annual interest rate over 8%, § 4.1a(f) limits charges by the lender (such as "points" and "service charges") to 3% of the loan principal amount. ***Currie v. Diamond Mortgage Corp. of Illinois,* 859 F.2d 1538, 1541 (7th Cir. 1988).**

In 1981, the Illinois legislature enacted comprehensive amendments to the Illinois Interest Act. The amendments were intended to increase the availability of funds for home financing — funds previously restricted by the Illinois Interest Act's limits on interest rates and fees associated with real estate loans. ***Currie, 859 F.2d at 1543.***

One of the 1981 amendments to the Illinois Interest Act, provided (emphasis added) that it is "lawful to charge, contract for, and receive *any rate or amount of interest or compensation*" with respect to certain specified transactions, including "loans secured by a mortgage on real estate." This is § 4(1)(*l*) of the Illinois Interest Act, as amended.

In other words, § 4(1)(*l*) removed all limits on interest rates, points, and other consideration charged on residential real estate mortgages. ***Currie*, 859 F.2d at 1542**. Seven years after the 1981 amendments, the United States Court of Appeals for the Seventh Circuit concluded that the language of § 4.1a(f) was wholly irreconcilable with the newly enacted § 4(1)(*l*):

> The deregulatory impetus of the 1981 amendments is inconsistent with the limitation on fees associated with real estate loans contained in Section 4.1a....
>
> The language of the two provisions is also irreconcilable. If Section 4.1a is allowed to stand with the amended Section 4, Section 4.1a would impose a limit on the amount of points which lenders may charge on loans in excess of 8% per annum, while Section 4 enables lenders to charge *any* amount for such loans. Clearly, the failure to repeal Section 4.1a was an oversight of the legislators.

***Currie*, 859 F.2d at 1543.**

The Seventh Circuit held that the 1981 amendments implicitly repealed § 4.1a(f) of the Illinois Interest Act. The Seventh Circuit further held that, because § 4.1a(f) was no longer effective, the district court properly *dismissed* the borrowers' suit against a lender over a loan origination fee equivalent to 16% of the principal amount of a residential mortgage loan.

In the suit at bar, the Krones' claims against HLOT-125 are based squarely upon § 4.1a(f) of the Illinois Interest Act. The Krones maintain that § 4.1a(f) has *not* been repealed. To support this argument, the Krones rely on one opinion of an Illinois appellate court – ***Fidelity Financial Services, Inc. v. Hicks*, 574 N.E.2d 15 (Ill. App. 1991).**

In ***Fidelity***, the Appellate Court of Illinois, First District, concluded that § 4.1a(f) was not impliedly repealed by the 1981 amendments to the Illinois Interest Act. The Court then found that the borrowers had stated a cause of action against the lender for violations of the Illinois Interest Act based on a "prepaid finance charge" of toughly 13.5% of principal.

In so holding, the First District acknowledged both the contrary holding of the Seventh Circuit in ***Currie*** and the February 1989 Opinion Letter of the Illinois Department of Financial Institutions adopting the ***Currie*** rationale. The

First District stressed that "neither the Seventh Circuit nor the Opinion Letters of state agencies bind state courts," and thus declared itself free to resolve the issue differently.

Clearly, this United States District Court is not free to simply ignore published opinions of the United States Court of Appeals for the Seventh Circuit. The Seventh Circuit spoke plainly in ***Currie***, holding that § 4.1a(f) of the Illinois Interest Act has been repealed. Additionally, as the Illinois Court of Appeals pointed out in ***Fidelity***, the Illinois Department of Financial Institutions adopted the holding of ***Currie***. The fact that a state regulatory agency, whose task it is to interpret Illinois laws relevant to financial transactions, has interpreted the provision in question here to be repealed, is telling.[5]

The parties agree that this Court, sitting in diversity, must apply the law of Illinois as would the highest court of that state. ***See Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938); *Allstate Ins. Co. v. Menards, Inc.*, 285 F.3d 630, 633 (7th Cir. 2002)("the ultimate responsibility of the district courts is to apply the law of the state in which the court sits with respect to substantive matters")**. To satisfy the mandate of ***Erie***, this District Court, exercising its diversity jurisdiction, "must make a predictive judgment as to how the supreme court of the state would decide the matter if it were presented presently to that tribunal." ***Allstate*, 285 F.3d at 635.**

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5 In support of dismissal, HLOT-125 submits both the Opinion Letter referenced in *Fidelity* and a January 1998 "Interpretive Letter" of the Illinois Office of Banks and Real Estate. However, as defense counsel surely are aware, on a Rule 12(b)(6) dismissal motion, this Court may not consider materials "outside" the pleadings, such as the attachments to HLOT-125's dismissal memorandum. This Court has confined its review to the pleadings before it, plus relevant case law.

Unfortunately, the Illinois Supreme Court has not addressed whether the 1981 amendments impliedly repealed § 4.1a(f) of the Illinois Interest Act. One Illinois Court of Appeals did address this issue in ***Fidelity***. But where a state's highest court has not decided an issue, the opinions of an intermediate appellate court of that state do not constitute "binding evidence" of how the state's Supreme Court would rule on an issue. ***Green v. J. C. Penney Auto Ins. Co., Inc.*** **806 F.2d 759, 761 (7th Cir. 1986), *citing Commissioner v. Estate of Bosch*, 387 U.S. 456, 465 (1967)("Intermediate appellate court cases are useful but not binding evidence of what the Illinois Supreme Court would do in a similar case.").**

So the Court considers ***Currie***, in which the Seventh Circuit held that § 4.1a of the Illinois Interest Act had been repealed, and ***Fidelity***, in which an Illinois Court of Appeals held tha § 4.1a was alive and well. One additional case must be considered.

In ***Jackson v. Resolution GGF OY*****, 136 F.3d 1130 (7th Cir. 1998)**, the Seventh Circuit again confronted a suit brought by Illinois borrowers to recover statutory penalties against lenders and their assignees. The borrowers' theory was that the lenders and assignees had charged points on the loans which exceeded those permitted by the Illinois Interest Act.

One question on appeal was whether a mere purchaser of the notes *who did not hold any of the notes* merited dismissal. The Seventh Circuit answered that question affirmatively, finding that no case or controversy existed between such defendants and the borrowers/plaintiffs. ***Id.*****, 136 F.3d at 1132**. Another question on appeal focused on whether a Defendant foreign corporation from Finland enjoyed immunity from financial penalties under the Foreign Sovereign Immunities Act, **28 U.S.C. § 1606**. The Court answered that question negatively.

The primary issue, however, was whether Defendant Harbor Financial Group could avoid liability by relying on a

safe harbor provision under a prior version of § 6 of the Illinois Interest Act, 815 ILCS 205/6. That provision protected financial companies who, *in good faith*, relied on (and conformed their business activities to) a rule, a regulation, or interpretation issued by the Illinois Department of Financial Institutions.

Harbor had relied on the February 1989 letter of the Legal Counsel for the Illinois Department of Financial Institutions which delineated the Department's position adopting ***Currie's*** holding that § 4.1a(f) of the Illinois Interest Act had been repealed. The Court concluded that Harbor was shielded by the safe harbor provision of § 6 of the Act. ***Jackson*, 136 F.3d at 1133.**

In ***Jackson***, the Seventh Circuit did not explicitly overrule ***Currie***. Nor did the Court find that ***Fidelity*** had rendered ***Currie*** meaningless. Indeed, ***Currie*** still appears as "good" law if one cite checks the case on Westlaw©.[6]

***Jackson*** did not flatly state whether § 4.1a(f) of the Illinois Interest Act had been repealed. The Court *did* mention in dicta that Defendant Harbor had been emboldened by ***Currie*** to charge more than 3 points on its Loans *until* the Illinois Court of Appeals handed down ***Fidelity***. Without commenting on whether it agreed with this conclusion, the Seventh Circuit described ***Fidelity*** as holding "that ***Currie*** misunderstood state law and that the points limitation remains force." ***Jackson*, 136 F.3d at 1131**. Careful review of ***Jackson*** reveals that it simply does not answer the question before this Court – whether § 4.1a(f) of the Illinois Interest Act can exist in the wake of the 1981 amendments.

This Court's task is to predict how the Illinois Supreme Court would resolve this issue. Having carefully

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6 The exercise reveals a notation that ***Jackson*** recognized "disagreement" with the holding of ***Currie***.

reviewed the relevant statutory provisions and all applicable caselaw, this Court concludes that the Illinois Supreme Court would find the plain language of § 4.1a(f) irreconcilable with the 1981 amendments (specifically, with § 4(l)(*l*)). Thus, as did the Seventh Circuit in ***Currie***, the Illinois Supreme Court would hold that a cause of action under § 4.1a(f) of the Illinois Interest Act no longer remains viable.

Because the Krones' case is premised entirely on § 4.1a(f) of the Illinois Interest Act, dismissal with prejudice is warranted.

HLOT-125 alternatively argues that Rule 12(b)(6) dismissal is required, because the Illinois Interest Act does not provide for vicarious liability. Stated another way, HLOT-125 contends that the Illinois Interest Act penalizes only the originator of a loan (here, 1st National), not a mere subsequent holder of the loan. The Court is not persuaded by this argument, although it need not reach the point at all, having already found dismissal merited on another ground.

It is true that § 4.1a(f) of the Act speaks in terms what a "lender" can charge or collect in connection with a loan. But § 6 of the Act, **815 ILCS 205/6**, imposes a penalty (twice the total of all interest, discount, and charges determined by the loan contract or paid by the obligor, whichever is greater, plus attorneys' fees and costs) against any "person or corporation" who *receives, directly or indirectly*, unlawful interest or charges in connection with a loan. This language sweeps broadly enough to encompass entities that take assignment of Illinois loans.[7]

Additionally, general principles of Illinois assignment law support the conclusion that HLOT-125 (as

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7 The Court does not reach the issue of whether federal law (i.e., HOEPA) enables the Krones to assert against HLOT-125 all claims and defenses they had against 1st National.

holder) stepped into the shoes of 1st National (the lender), thereby acquiring 1st National's interest, subject to all claims and defenses existing at the time of the assignment. ***See, e.g., John O. Schofield Inc. v. Nikkel*, 731 N.E.2d 915, 925 (Ill. App, 2000), *quoting Stavros v. Karkomi*, 349 N.E.2d 599 (Ill. 1976)(Illinois law is "well settled" that when a valid assignment is effected, the assignee acquires all of the interest of the assignor in the property that is transferred and "takes the assignor's interest subject to all legal and equitable defenses existing at the time of the assignment.").**

Dismissal is not warranted on the theory that HLOT-125 is not the original lender to the Krones. But dismissal is warranted on the ground that the Illinois legislature implicitly repealed the provision on which the Krones' cause of action rests - § 4.1a(f) of the Illinois Interest Act.

**IV. Conclusion**

Accordingly, the Court **GRANTS** HLOT-125's motion to dismiss (Doc. 199). Dismissal of this case shall be *with* prejudice.

**IT IS SO ORDERED.**

DATED this 27th day of August, 2003.

*/s/ Michael J. Reagan*

MICHAEL J. REAGAN

United States District Judge

STATE OF ILLINOIS
DEPARTMENT OF FINANCIAL INSTITUTIONS

State of Illinois Center
100 West Randolph * Suite 15-700
Chicago, Illinois 60601

James R. Thompson
Governor

Michael E. Fryzel
Director
Joanne Mitchell
Assistant Director

February 28, 1989

Mr. Harry E. Sandstrom
Assistant General Counsel
Norwest Financial, Inc.
208 Eight Street
Des Moines, Iowa 50309

RE: Points on Illinois Loans

Dear Mr. Sandstrom:

Your January 13, 1989 letter to the Department referred to the recently decided case of Currie v. Diamond Mortgage Corp. of Illinois, 839 F.2nd 1538, [*sic*] (7th Cir. 1988) and inquired whether the Department would criticize a Consumer Installment Loan Act licensee who charged "points" in excess of the limitation set forth in Section 4.1a of the General Interest Statute (Ill. Rev. Stat., 1987, Ch. 17, Par. 6406).

It is the Department's position that the Currie Court clearly held that the 1983 amendments to Section 4(1)(L) (Par. 6404(1)(L) of the Statute provide that it is lawful to charge any rate of interest or compensation on loans secured by a mortgage on real estate. This amendment is so clearly inconsistent with the points limitation in Section 4.1a of the Statute that such limitation is necessarily repealed. Under

these circumstances, the licensee is no longer bound by the points limitation in Section 4.1a.

Very truly yours,

*/s/ Ferdinand J. Zeni, Jr.*

Ferdinand J. Zeni, Jr.

LEGAL COUNSEL

FJZ/yb

cc: A. Madonia
L. Pusateri

# Opinion 96-037

December 3, 1996
FILE NO. 96-037

FINANCIAL INSTITUTIONS:
Federal Preemption of Interest Act Points Limitation

Frank C. Casillas
Director
Illinois Department of Financial Institutions
James R. Thompson Center, 15-700
Chicago, Illinois 60601

Dear Mr. Casillas:

I have your letter wherein you inquire whether section 501 of the Depository Institutions Deregulation and Monetary Control Act of 1980 (12 U.S.C. 1735f-7a) (hereinafter referred to as "DIDMCA") preempts section 4.1a of the Illinois Interest Act (815 ILCS 205/4.1a (West 1994)), thereby permitting lenders in Illinois to charge more than three points on residential first mortgage loans. For the reasons hereinafter stated, it is my opinion that DIDMCA does preempt section 4.1a of the Illinois Interest Act, to the extent that section 4.1a would otherwise limit the points which lenders may charge on residential first mortgage loans with interest rates in excess of 8% per annum.

The pertinent portion of section 4.1a of the Illinois Interest Act provides:

"* * *

> Where there is a charge in addition to the stated rate of interest payable directly or indirectly by the borrower and imposed directly or indirectly by the lender as a consideration for the loan, or for or in connection with the loan of money, whether paid or payable by the borrower, the seller, or any other person on behalf of the borrower to the lender or to a

> third party, or for or in connection with the loan of money, other than as hereinabove in this Section provided, whether denominated 'points,' 'service charge,' 'discount,' 'commission,' or otherwise, and without regard to declining balances of principal which would result from any required or optional amortization of the principal of the loan, the rate of interest shall be calculated in the following manner:
>
> The percentage of the principal amount of the loan represented by all of such charges shall first be computed, which in the case of a loan with an interest rate in excess of 8% per annum secured by residential real estate, other than loans described in paragraphs (e) and (f) of Section 4, shall not exceed 3% of such principal amount. Said percentage shall then be divided by the number of years and fractions thereof of the period of the loan according to its stated maturity. The percentage thus obtained shall then be added to the percentage of the stated annual rate of interest.
>
> * * * (Emphasis added.)

The provisions limiting charges to 3% of the principal amount on loans bearing interest in excess of 8% that are secured by residential real estate were added to the section by Public Act 78-996, effective July 12, 1974. The quoted paragraphs have not been amended or re-enacted since that date.

Section 501 of DIDMCA (12 U.S.C. 1735f-7a) provides, in pertinent part:

> "(a) Applicability to loan, mortgage, credit sale, or advance; applicability to deposit, account, or obligation. (1) The provisions of the constitution or the laws of any State expressly limiting the rate or amount of interest, discount points, finance charges, or other charges, which may be charged, taken, received, or reserved shall not apply to any loan, mortgage, credit sale or advance which is--

(A) secured by first lien on residential real property, by a first lien on all stock allocated to a dwelling unit in a residential cooperative housing corporation or by a first lien on a residential manufactured home;

(B) made after March 31,1980; and

(C) described in section 527(b) of the National Housing Act (12 U.S.C. 1735f-5(b))

* * *

(b) Applicability to loan, mortgage, credit sale, or advance made in any State after April 1, 1980. (1) Except as provided in paragraphs (2) and (3), the provisions of subsection (a)(1) shall apply to any loan, mortgage, credit sale, or advance made in any State on or after April 1, 1980.

* * *

(4) At any time after the date of enactment of this Act [enacted March 31, 1980], any State may adopt a provision of law placing limitations on discount points or such other charges on any loan, mortgage, credit sale, or advance described in subsection (a)(1).

* * *"

The express language of the Federal statute preempts the application of any State statute enacted prior to March 31, 1980, with respect to those loans to which the Federal enactment applies. The Federal Appellate Court so held in Currie v. Diamond Mortgage Corp. (7th Cir. 1988), 859 F.2d 1538. Your letter indicates, however, that confusion has arisen regarding whether the preemption extends to non-purchase money loans because of the decision of the Illinois Appellate Court in Fidelity Financial Services, Inc. v. Hicks (1991), 214 Ill. App. 3d 398, appeal denied, 141 Ill. 2d 539 (1991).

In Fidelity Financial Services, Inc. v. Hicks, the appellate court held that the lender had violated section 4.1a of the Illinois Interest Act by imposing a "prepaid finance charge" in excess 13%. With respect to the issue of preemption, the court held that the mortgage in question was not a first lien, and that it was not a purchase-money mortgage; therefore, section 501 of DIDMCA did not preempt the State law. The conclusion that section 501 of DIDMCA did not apply to non-purchase money mortgages was not necessary to the result in the case (since the court had concluded that the loan was not a first lien), and there was no discussion of the Federal authorities on that issue.

Recently, in Gora v. Banc One Financial Services, Inc., No. 95C2542, 1995 U.S. Dist. LEXIS 15232 (N.D. Ill. Oct. 11, 1995), the district court discussed the decision in Fidelity Financial Services, Inc. v. Hicks together with Federal precedent relating to the application of section 501 of DIDMCA to non-purchase money loans. The court discussed Smith v. Fidelity Consumer Discount Co. (3rd Cir. 1990), 898 F.2d 907, in which the appellate court concluded that the plain language of section 501 of DIDMCA applies to all loans secured by a first lien of residential property, whether for purchase money or not. The district court followed that precedent, rejecting the reasoning of Fidelity Financial Services, Inc. v. Hicks.

The Illinois Supreme Court has held that Federal Court decisions supply the rule of law for interpreting Federal statutes. (Boyer v. Atchison, Topeka and Santa Fe Ry. Co. (1967), 38 Ill. 2d 31, cert. denied, 390 U.S. 949, 88 S. Ct. 1038 (1967); Elgin, Joliet and Eastern Ry. Co. v. Industrial Comm'n (1956), 9 Ill. 2d 505, 507.) Further, the Illinois Appellate Court has agreed that Federal decisions determine the preemptive reach of Federal statutes. Golden Bear Family Restaurants v. Murray (1986), 144 Ill. App. 3d 616, 619, appeal denied,112 Ill. 2d 574 (1986); Busch v. Graphic Color Corp. (1996), 169 Ill. App. 2d 325, 335.

In accordance with the pertinent decisions of the Federal Courts, it is my opinion that section 501 of DIDMCA preempts section 4.1a of the Illinois Interest Act, a pre-

existing State statute, with respect to its limitation on the points that may charged in connection with mortgage loans secured by a first lien on residential property, regardless of whether the loans constitute purchase money loans.

Sincerely,

*/s/ Jim Ryan*

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http://www.ag.state.il.us/opinions/1996/96-037.html

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